

U.S. District Court
District of Nebraska (8 Omaha)
CIVIL DOCKET FOR CASE #: 8:18-cv-00462-JMG-SMB

Equal Employment Opportunity Commission v. Drivers
Management, LLC et al

Assigned to: Senior Judge John M. Gerrard

Referred to: Judge Susan M. Bazis Magistrate Judge

Lead case: 8:18-cv-00329-JMG-SMB

Member case:

8:18-cv-00462-JMG-SMB

Case in other court: USDC-NE, 8:18CV329

Cause: 42:12101 Americans with Disabilities Act

Plaintiff

**Equal Employment Opportunity
Commission**

represented by **C. Felix Miller**

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION –
MISSOURI

1222 Spruce Street

Room 8.100

St. Louis, MO 63103

(314) 539-7914

Fax: (314) 539-7895

Email: felix.miller@eeoc.gov

TERMINATED: 09/01/2021

ATTORNEY TO BE NOTICED

Connie W. Gatlin

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION

Leland Federal Building

1919 Smith Street

6th Floor

Houston, TX 77002

346-327-7710

Fax: 713-651-7995

Email: connie.gatlin@eeoc.gov

ATTORNEY TO BE NOTICED

Emily Keatley

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION –
KANSAS

400 State Avenue

Suite 905

Kansas City, KS 66101

(913) 551-6648

Fax: (913) 551-5848
Email: emily.keatley@eeoc.gov
TERMINATED: 02/26/2021
ATTORNEY TO BE NOTICED

Grant R. Doty
BURGER LAW FIRM
500 North Broadway
Suite 1860
St. Louis, MO 63102
314-542-2222
Email: grant.doty@gmail.com
TERMINATED: 06/29/2022
ATTORNEY TO BE NOTICED

Joshua Pierson
EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION –
KANSAS
400 State Avenue
Suite 905
Kansas City, KS 66101
913-359-1807
Email: joshua.pierson@eeoc.gov
ATTORNEY TO BE NOTICED

Lauren M. Wilson
U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
400 State Avenue
Suite 905
Kansas City, KS 66101
913-562-4495
Email: lauren.wilson@eeoc.gov
ATTORNEY TO BE NOTICED

Meredith S. Berwick
EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION –
MISSOURI
1222 Spruce Street
Room 8.100
St. Louis, MO 63103
(314) 539-7915
Email: meredith.berwick@eeoc.gov
ATTORNEY TO BE NOTICED

V.

Defendant

Drivers Management, LLC

represented by

Brandon J. Crainer
FRASER, STRYKER LAW FIRM
409 South 17th Street
Suite 500, Energy Plaza
Omaha, NE 68102
(402) 341-6000
Fax: (402) 341-8290
Email: bcrainer@fisherphillips.com
TERMINATED: 02/25/2021

Elizabeth A. Culhane
FRASER, STRYKER LAW FIRM
409 South 17th Street
Suite 500, Energy Plaza
Omaha, NE 68102
(402) 341-6000
Fax: (402) 341-8290
Email: eculhane@fraserstryker.com
ATTORNEY TO BE NOTICED

Joseph E. Jones
FRASER, STRYKER LAW FIRM
409 South 17th Street
Suite 500, Energy Plaza
Omaha, NE 68102
(402) 341-6000
Fax: (402) 341-8290
Email: jjones@fraserstryker.com
TERMINATED: 01/15/2021
ATTORNEY TO BE NOTICED

Patrick J. Barrett
FRASER, STRYKER LAW FIRM
409 South 17th Street
Suite 500, Energy Plaza
Omaha, NE 68102
(402) 341-6000
Fax: (402) 341-8290
Email: pbarrett@fraserstryker.com
ATTORNEY TO BE NOTICED

Sarah L. McGill
FRASER, STRYKER LAW FIRM
409 South 17th Street
Suite 500, Energy Plaza
Omaha, NE 68102
(402) 341-6000
Fax: (402) 341-8290
Email: smcgill@fraserstryker.com
ATTORNEY TO BE NOTICED

Defendant

Werner Enterprises, Inc.

represented by **Brandon J. Crainer**
(See above for address)
TERMINATED: 02/25/2021

Elizabeth A. Culhane
(See above for address)
ATTORNEY TO BE NOTICED

Joseph E. Jones
(See above for address)
TERMINATED: 01/15/2021
ATTORNEY TO BE NOTICED

Patrick J. Barrett
(See above for address)
ATTORNEY TO BE NOTICED

Sarah L. McGill
(See above for address)
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
09/28/2018	<u>1</u>	COMPLAINT with jury demand against Drivers Management, LLC, Werner Enterprises, Inc., by Attorney Emily Keatley on behalf of Equal Employment Opportunity Commission(Keatley, Emily) (Entered: 09/28/2018)
09/28/2018	2	TEXT NOTICE OF JUDGES ASSIGNED: Judge John M. Gerrard and Magistrate Judge Susan M. Bazis assigned. (LKO) (Entered: 09/28/2018)
09/28/2018	<u>3</u>	ATTACHMENT – CONTINUED regarding Complaint <u>1</u> . <i>Civil Cover Sheet</i> by Attorney Emily Keatley on behalf of Plaintiff Equal Employment Opportunity Commission.(Keatley, Emily) (Entered: 09/28/2018)
09/28/2018	<u>4</u>	NOTICE of Appearance by Attorney Emily Keatley on behalf of Plaintiff Equal Employment Opportunity Commission (Keatley, Emily) (Entered: 09/28/2018)
10/09/2018	<u>5</u>	WAIVER OF SERVICE Returned Executed upon defendant Drivers Management, LLC. Waiver sent on 10/1/2018; Werner Enterprises, Inc.. Waiver sent on 10/1/2018. (Keatley, Emily) (Entered: 10/09/2018)
11/29/2018	<u>6</u>	ANSWER to Complaint with with jury demand by Drivers Management, LLC, Werner Enterprises, Inc. (Jones, Joseph) (Entered: 11/29/2018)
11/29/2018	7	TEXT NOTICE REGARDING CORPORATE DISCLOSURE STATEMENT by Deputy Clerk as to Defendant Werner Enterprises, Inc. Pursuant to Fed. R. Civ. P. 7.1, non–governmental corporate parties are required to file Corporate Disclosure Statements (Statements). The parties shall use the form Corporate Disclosure Statement, available on the Web site of the court at http://www.ned.uscourts.gov/forms/ . If you have not filed your Statement, you must do so within 15 days of the date of this notice. If you have already filed your Statement in this case, you are reminded to file a Supplemental Statement within a reasonable time of any change in the information that the statement requires. (KMM)

		(Entered: 11/29/2018)
11/29/2018	8	TEXT NOTICE REGARDING CORPORATE DISCLOSURE STATEMENT by Deputy Clerk as to Defendant Drivers Management, LLC. Pursuant to Fed. R. Civ. P. 7.1, non-governmental corporate parties are required to file Corporate Disclosure Statements (Statements). The parties shall use the form Corporate Disclosure Statement, available on the Web site of the court at http://www.ned.uscourts.gov/forms/ . If you have not filed your Statement, you must do so within 15 days of the date of this notice. If you have already filed your Statement in this case, you are reminded to file a Supplemental Statement within a reasonable time of any change in the information that the statement requires. (KMM) (Entered: 11/29/2018)
11/29/2018	9	NOTICE of Appearance by Attorney Grant R. Doty on behalf of Plaintiff Equal Employment Opportunity Commission (Doty, Grant) (Entered: 11/29/2018)
11/29/2018	10	CORPORATE DISCLOSURE STATEMENT pursuant to Fed. R. Civ. P. 7.1 for Defendant Werner Enterprises, Inc. by Attorney Brandon J. Crainer on behalf of Defendant Werner Enterprises, Inc..(Crainer, Brandon) (Entered: 11/29/2018)
11/29/2018	11	CORPORATE DISCLOSURE STATEMENT pursuant to Fed. R. Civ. P. 7.1 identifying Corporate Parent Werner Enterprises, Inc., Corporate Parent Gra-Gar, LLC for Drivers Management, LLC. by Attorney Brandon J. Crainer on behalf of Defendants Drivers Management, LLC, Gra-Gar, LLC, Werner Enterprises, Inc..(Crainer, Brandon) (Entered: 11/29/2018)
12/03/2018	12	UNOPPOSED MOTION to Consolidate Case(s) 8:18cv329 by Attorney Elizabeth A. Culhane on behalf of Defendants Drivers Management, LLC, Werner Enterprises, Inc..(Culhane, Elizabeth) (Entered: 12/03/2018)
12/04/2018	13	ORDER – The motions to consolidate (Case No. 8:18CV329, Filing No. 34 ; Case No. 8:18CV462, Filing No. 12) are granted. <i>EEOC v. Werner Enterprises, Inc.</i> Case No. 8:18CV329 and <i>EEOC v. Drivers Management, LLC</i> , Case No. 8:18CV462 are consolidated for discovery purposes only. Counsel shall conduct discovery as if these consolidated cases are part of a single case. Case No. 8:18CV329 is hereby designated as the "Lead Case." Case No. 8:18CV462 is designated as the "Member Case." Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB Ordered by Magistrate Judge Susan M. Bazis. (KLF) (Entered: 12/04/2018)
12/07/2018	14	SCHEDULING LETTER – In completing the required Rule 26(f) Report, counsel should use the revised Form 35 ("Rule 26(f) Report") posted on the Court's website. The Rule 26(f) Report should be filed with the Court no later than January 7, 2019. The Clerk of the Court is directed to set a case management deadline using the following text: "January 7, 2019 check for Rule 26(f) Report." Ordered by Magistrate Judge Susan M. Bazis. (KLF) (Entered: 12/07/2018)
12/07/2018	15	RESTRICTED CASE CONFERENCE INSTRUCTIONS. ACCESS TO THE PDF DOCUMENT IS RESTRICTED TO CASE PARTICIPANTS AND THE COURT PURSUANT TO THE E-GOVERNMENT ACT AND FEDERAL RULE OF CIVIL PROCEDURE 5.2(a). Ordered by Magistrate Judge Susan M. Bazis. (KLF) (Entered: 12/07/2018)
12/26/2018	16	MOTION to Stay <i>this litigation and extend all deadlines due to the lapse in EEOC appropriations</i> by Attorney Grant R. Doty on behalf of Plaintiff Equal Employment Opportunity Commission.(Doty, Grant) (Entered: 12/26/2018)

12/26/2018	<u>17</u>	ORDER – granting <u>16</u> Motion to Stay. Due to a lapse in appropriations for the Commission at 12:01 a.m. on December 22, 2018, the litigation of this matter is stayed until the Commission's funding is restored, and all pending deadlines in this matter are extended for the same number of days as the EEOC's lapse in funding. The parties shall file their Rule 26(f) Report within fourteen (14) days of the restoration of funding. Ordered by Magistrate Judge Susan M. Bazis. (KLF) (Entered: 12/26/2018)
02/01/2019	<u>18</u>	STATUS REPORT (<i>Joint</i>) on behalf of all parties by Attorney Grant R. Doty on behalf of Plaintiff Equal Employment Opportunity Commission. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Doty, Grant) (Entered: 02/01/2019)
02/04/2019	19	TEXT ORDER: Status reports have been filed in Case No. 8:18CV329 (Filing No. 39) and Case No. 8:18CV462 (Filing No. 18). Upon review, the Court finds that a joint planning conference for Case No. 8:18CV329 and Case No. 8:18CV462 is appropriate. Therefore, the planning conference for each of these cases will be held on March 15, 2019, at 1:30 p.m. The Rule 26(f) Report in Case No. 8:18CV462 is due on February 8, 2019. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB. Ordered by Magistrate Judge Susan M. Bazis. (RMW) (Entered: 02/04/2019)
02/08/2019	<u>20</u>	REPORT of Rule 26(f) Planning Meeting (<i>proposed protective order emailed to chambers</i>) by Attorney Grant R. Doty on behalf of Plaintiff Equal Employment Opportunity Commission.(Doty, Grant) (Entered: 02/08/2019)
02/12/2019	<u>21</u>	STIPULATED PROTECTIVE ORDER – This matter is before the Court upon the request of the parties in their Rule 26(f) Report (Filing No. <u>20</u>) for the entry of a protective order. Having considered the matter, this Court enters the following Protective Order governing the confidential and proprietary information obtained in this case. Ordered by Magistrate Judge Susan M. Bazis. (KLF) (Entered: 02/12/2019)
02/14/2019	<u>22</u>	NOTICE of <i>Serving Discovery</i> by Attorney Elizabeth A. Culhane on behalf of Defendants Werner Enterprises, Inc., Drivers Management, LLC, Werner Enterprises, Inc. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Culhane, Elizabeth) (Entered: 02/14/2019)
02/21/2019	<u>23</u>	NOTICE of <i>Serving Discovery</i> by Attorney Dianne D. DeLair on behalf of Intervenor Plaintiff Andrew Deuschle Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(DeLair, Dianne) (Entered: 02/21/2019)
03/08/2019	<u>24</u>	NOTICE of <i>Service of Rule 26 Initial Disclosures</i> by Attorney Brandon J. Crainer on behalf of Defendants Drivers Management, LLC, Werner Enterprises, Inc. (Crainer, Brandon) (Entered: 03/08/2019)
03/08/2019	<u>25</u>	NOTICE of <i>Service of Plaintiff EEOC's Rule 26 Initial Disclosures</i> by Attorney Emily Keatley on behalf of Plaintiff Equal Employment Opportunity Commission (Keatley, Emily) (Entered: 03/08/2019)
03/15/2019	<u>26</u>	NOTICE of <i>Plaintiff EEOC's Service of Discovery on Defendants</i> by Attorney Emily Keatley on behalf of Plaintiffs Equal Employment Opportunity Commission, Equal Employment Opportunity Commission Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Keatley, Emily) (Entered: 03/15/2019)
03/15/2019	27	TEXT MINUTE ENTRY for planning conference held before Magistrate Judge Susan M. Bazis on 3/15/2019. The parties shall meet and confer and submit a new

		stipulation regarding expert deadlines by 3/22/19. Once the Court receives the stipulation, a final progression order will be issued. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB. (RMW) (Entered: 03/15/2019)
03/19/2019	<u>28</u>	UNOPPOSED MOTION for Leave to File First Amended Complaint in Intervention by Attorney Brian East on behalf of Intervenor Plaintiff Andrew Deuschle. (Attachments: # <u>1</u> First Amended Complaint in Intervention)Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(East, Brian) (Entered: 03/19/2019)
03/20/2019	29	TEXT ORDER granting <u>28</u> Unopposed Motion for Leave to File First Amended Complaint in Intervention. Andrew Deuschle shall file his amended complaint in intervention by March 22, 2019. Ordered by Magistrate Judge Susan M. Bazis. (LRH) (Entered: 03/20/2019)
03/21/2019	<u>30</u>	JOINT STIPULATION regarding Telephone Conference, (44 in 8:18-cv-00329-JMG-SMB) <i>Progression Order Deadlines</i> by Attorney Brandon J. Crainer on behalf of Defendants Werner Enterprises, Inc., Werner Enterprises, Inc..Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Crainer, Brandon) (Entered: 03/21/2019)
03/21/2019	<u>31</u>	STIPULATION <i>Regarding Werner's Deadline to Respond to Requests for Admission by Plaintiff Intervenor Andrew Deuschle</i> by Attorney Elizabeth A. Culhane on behalf of Defendants Werner Enterprises, Inc., Drivers Management, LLC, Werner Enterprises, Inc..Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Culhane, Elizabeth) (Entered: 03/21/2019)
03/22/2019	32	TEXT ORDER approving <u>31</u> Stipulation Regarding Deadline to Respond to Requests for Admission. Werner shall respond to the Requests for Admission served by Plaintiff-Intervenor by April 20, 2019. Ordered by Magistrate Judge Susan M. Bazis. (LRH) (Entered: 03/22/2019)
03/28/2019	<u>33</u>	FINAL PROGRESSION ORDER – The non- expert deposition deadline is November 1, 2019. The expert deposition deadline is November 22, 2019. The jury trial of this case is set to commence before John M. Gerrard, Chief United States District Judge, in the Special Proceedings Courtroom, Roman L. Hruska Federal Courthouse, 111 South 18th Plaza, Omaha, Nebraska, at 9:00 a.m. on August 17, 2020, or as soon thereafter as the case may be called, for a duration of three (3) trial days. The Pretrial Conference is scheduled to be held before the undersigned magistrate judge on July 27, 2020 at 11:00 a.m., and will be conducted by internet/telephonic conferencing. Counsel shall use the conferencing instructions assigned to this case to participate in the conference. Ordered by Magistrate Judge Susan M. Bazis. (KLF) (Entered: 03/28/2019)
04/15/2019	<u>34</u>	NOTICE of <i>Service of Responses to Defendants' Interrogatories and Requests For Production</i> by Attorney Emily Keatley on behalf of Plaintiffs Equal Employment Opportunity Commission, Equal Employment Opportunity Commission Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Keatley, Emily) (Entered: 04/15/2019)
04/19/2019	<u>35</u>	NOTICE of <i>Notice of Service of Discovery Documents</i> by Attorney Brandon J. Crainer on behalf of Defendants Werner Enterprises, Inc., Drivers Management, LLC, Werner Enterprises, Inc. Member Cases: 8:18-cv-00329-JMG-SMB,

		8:18-cv-00462-JMG-SMB(Crainer, Brandon) (Entered: 04/19/2019)
04/19/2019	<u>36</u>	NOTICE of <i>Amended Notice of Service of Discovery Documents</i> by Attorney Brandon J. Crainer on behalf of Defendants Werner Enterprises, Inc., Drivers Management, LLC, Werner Enterprises, Inc. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Crainer, Brandon) (Entered: 04/19/2019)
04/24/2019	<u>37</u>	NOTICE of <i>Serving Discovery Responses</i> by Attorney Elizabeth A. Culhane on behalf of Defendants Werner Enterprises, Inc., Werner Enterprises, Inc. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Culhane, Elizabeth) (Entered: 04/24/2019)
06/14/2019	<u>38</u>	UNOPPOSED MOTION to Extend <i>Progression Order Deadlines</i> by Attorney Emily Keatley on behalf of Plaintiffs Equal Employment Opportunity Commission, Equal Employment Opportunity Commission. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Keatley, Emily) (Entered: 06/14/2019)
06/25/2019	<u>39</u>	AMENDED FINAL PROGRESSION ORDER granting <u>38</u> Motion to Extend. Deadlines extended as stated. Trial remains set before John M. Gerrard, Chief United States District Judge, in the Special Proceedings Courtroom, Roman L. Hruska Federal Courthouse, 111 South 18th Plaza, Omaha, Nebraska, at 9:00 a.m. on August 17, 2020. Pretrial Conference remains scheduled to be held before the undersigned magistrate judge on July 27, 2020 at 11:00 a.m., and will be conducted by internet/telephonic conferencing. Ordered by Magistrate Judge Susan M. Bazis. (JAB) (Entered: 06/25/2019)
06/25/2019	<u>40</u>	STRICKEN- AMENDED FINAL PROGRESSION ORDER - The non-expert deposition deadline is December 2, 2019. The expert deposition deadline is December 20, 2019. Jury Trial set for 6/15/2020 at 09:00 AM Courtroom 1 (Special Proceedings), Roman L. Hruska Federal Courthouse, 111 South 18th Plz, Omaha, NE before Chief Judge John M. Gerrard. Pretrial Conference set for 5/18/2020 at 11:00 AM Internet/Telephonic Conferencing before Magistrate Judge Susan M. Bazis. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB Ordered by Magistrate Judge Susan M. Bazis. (LAC) Modified on 6/25/2019 to Strike per 41 Order (LAC). (Entered: 06/25/2019)
06/25/2019	41	TEXT STRIKE ORDER that Pursuant to NENR 1.3(a)(4), the AMENDED FINAL PROGRESSION ORDER <u>40</u> is stricken for the following reason(s): document filed in incorrect case. Ordered by Deputy Clerk. (LAC) (Entered: 06/25/2019)
07/30/2019	<u>42</u>	NOTICE of <i>Service of Discovery</i> by Attorney Emily Keatley on behalf of Plaintiffs Equal Employment Opportunity Commission, Equal Employment Opportunity Commission Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Keatley, Emily) (Entered: 07/30/2019)
08/19/2019	<u>43</u>	JOINT MOTION to Extend <i>Amended Progression Order Deadlines</i> by Attorney Emily Keatley on behalf of Plaintiffs Equal Employment Opportunity Commission, Equal Employment Opportunity Commission. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Keatley, Emily) (Entered: 08/19/2019)
08/21/2019	<u>44</u>	SECOND AMENDED FINAL PROGRESSION ORDER granting <u>43</u> Motion to Extend. Jury Trial set for 12/14/2020 at 09:00 AM Courtroom 1 (Special Proceedings), Roman L. Hruska Federal Courthouse, 111 South 18th Plz, Omaha, NE

		before Chief Judge John M. Gerrard. Pretrial Conference set for 11/20/2020 at 10:00 AM Internet/Telephonic Conferencing before Magistrate Judge Susan M. Bazis. Ordered by Magistrate Judge Susan M. Bazis. (ADB) (Entered: 08/21/2019)
08/21/2019	45	TEXT ORDER correcting Paragraph 2 in Filing No. <u>62</u> . The parties proposed Pretrial Conference Order and Exhibit List(s) must be emailed to bazis@ned.uscourts.gov, in Word format, by 12:00 p.m. on September 30, 2020. Ordered by Magistrate Judge Susan M. Bazis. (RMW) (Entered: 08/21/2019)
09/23/2019	<u>46</u>	NOTICE of <i>Service</i> by Attorney Brandon J. Crainer on behalf of Defendants Werner Enterprises, Inc., Drivers Management, LLC, Werner Enterprises, Inc. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Crainer, Brandon) (Entered: 09/23/2019)
09/27/2019	<u>47</u>	NOTICE of <i>Serving Discovery Responses</i> by Attorney Brandon J. Crainer on behalf of Defendants Werner Enterprises, Inc., Drivers Management, LLC, Werner Enterprises, Inc. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Crainer, Brandon) (Entered: 09/27/2019)
10/23/2019	48	TEXT ORDER: A discovery dispute has arisen in this case. A telephone conference to discuss the matter will be held on 11/5/2019 at 11:00 a.m. Case conference instructions are found at Filing No. <u>28</u> (18cv325) and found at Filing No. <u>15</u> (18cv462). By 12:00 p.m. on 10/30/2019, Defendants shall submit brief position statements (no more than 2 pages) to bazis@ned.uscourts.gov. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB Ordered by Magistrate Judge Susan M. Bazis. (RMW) Modified on 10/23/2019 (RMW). (Entered: 10/23/2019)
10/25/2019	<u>49</u>	NOTICE of <i>Service of Discovery</i> by Attorney Emily Keatley on behalf of Plaintiffs Equal Employment Opportunity Commission, Equal Employment Opportunity Commission Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Keatley, Emily) (Entered: 10/25/2019)
10/25/2019	<u>50</u>	NOTICE of <i>Serving Discovery Responses</i> by Attorney Brandon J. Crainer on behalf of Defendants Werner Enterprises, Inc., Drivers Management, LLC, Werner Enterprises, Inc. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Crainer, Brandon) (Entered: 10/25/2019)
11/01/2019	<u>51</u>	JOINT MOTION to Extend <i>Second Amended Progression Order Deadlines</i> by Attorney Emily Keatley on behalf of Plaintiffs Equal Employment Opportunity Commission, Equal Employment Opportunity Commission. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Keatley, Emily) (Entered: 11/01/2019)
11/01/2019	<u>52</u>	NOTICE of <i>Serving Discovery Responses</i> by Attorney Brandon J. Crainer on behalf of Defendants Werner Enterprises, Inc., Drivers Management, LLC, Werner Enterprises, Inc. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Crainer, Brandon) (Entered: 11/01/2019)
11/05/2019	53	TEXT MINUTE ENTRY for proceedings held before Magistrate Judge Susan M. Bazis. Telephone Conference held on 11/5/2019. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB (LRH) (Entered: 11/05/2019)
11/05/2019	54	

		TEXT ORDER – A telephone conference regarding a discovery dispute was held today. Following consideration, the Court orders that Plaintiff may mount a camera within the cab of Defendant's truck to observe training for a period of five hours. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB Ordered by Magistrate Judge Susan M. Bazis. (LRH) (Entered: 11/05/2019)
11/05/2019	<u>55</u>	THIRD AMENDED FINAL PROGRESSION ORDER – This matter is before the Court on the parties' Unopposed Motion to Extend Progression Order Deadlines. (Filing No. <u>43</u> .) The motion is granted. The trial and pretrial conference will not be reset at this time. A telephonic status conference to discuss case progression, the parties' interest in settlement, and the trial and pretrial conference settings will be held with the undersigned magistrate judge on June 24, 2020 at 3:00 p.m. Counsel shall use the conferencing instructions assigned to this case to participate in the conference. Ordered by Magistrate Judge Susan M. Bazis. (KLF) (Entered: 11/05/2019)
11/05/2019	<u>56</u>	RESTRICTED AUDIO FILE (7.4 MB) regarding Telephone Conference 53 held on 11/05/2019 at 11:02 a.m. before Magistrate Judge Susan M. Bazis. ACCESS TO THE PDF DOCUMENT IS RESTRICTED TO CASE PARTICIPANTS AND THE COURT PURSUANT TO THE E-GOVERNMENT ACT AND FEDERAL RULE OF CIVIL PROCEDURE 5.2(e). (MBM) (Entered: 11/05/2019)
11/25/2019	<u>57</u>	NOTICE of <i>Service of Discovery Responses</i> by Attorney Brandon J. Crainer on behalf of Defendants Werner Enterprises, Inc., Drivers Management, LLC, Werner Enterprises, Inc. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Crainer, Brandon) (Entered: 11/25/2019)
11/26/2019	<u>58</u>	NOTICE of <i>Service of Discovery</i> by Attorney Emily Keatley on behalf of Plaintiffs Equal Employment Opportunity Commission, Equal Employment Opportunity Commission Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Keatley, Emily) (Entered: 11/26/2019)
11/26/2019	<u>59</u>	NOTICE of <i>Serving Discovery Responses</i> by Attorney Brandon J. Crainer on behalf of Defendants Werner Enterprises, Inc., Drivers Management, LLC, Werner Enterprises, Inc. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Crainer, Brandon) (Entered: 11/26/2019)
12/09/2019	<u>60</u>	NOTICE of <i>Serving Discovery Responses</i> by Attorney Brandon J. Crainer on behalf of Defendants Werner Enterprises, Inc., Drivers Management, LLC, Werner Enterprises, Inc. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Crainer, Brandon) (Entered: 12/09/2019)
12/11/2019	<u>61</u>	NOTICE of <i>Serving Discovery Requests</i> by Attorney Brandon J. Crainer on behalf of Defendants Werner Enterprises, Inc., Drivers Management, LLC, Werner Enterprises, Inc. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Crainer, Brandon) (Entered: 12/11/2019)
12/18/2019	<u>62</u>	NOTICE of <i>Serving Discovery Responses</i> by Attorney Brandon J. Crainer on behalf of Defendants Werner Enterprises, Inc., Drivers Management, LLC, Werner Enterprises, Inc. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Crainer, Brandon) (Entered: 12/18/2019)
12/20/2019	<u>63</u>	NOTICE of <i>Service of Discovery Requests</i> by Attorney Emily Keatley on behalf of Plaintiffs Equal Employment Opportunity Commission, Equal Employment Opportunity Commission Member Cases: 8:18-cv-00329-JMG-SMB,

		8:18-cv-00462-JMG-SMB(Keatley, Emily) (Entered: 12/20/2019)
01/08/2020	<u>64</u>	NOTICE to Take Deposition of Defendants Werner Enterprises and Drivers Management, Jaime Maus, Scott Hollenbeck by Attorney Emily Keatley on behalf of Plaintiffs Equal Employment Opportunity Commission, Equal Employment Opportunity Commission Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Keatley, Emily) (Entered: 01/08/2020)
01/08/2020	<u>65</u>	NOTICE of <i>Serving Notice of Intent to Serve Rule 45 Subpoena Duces Tecum</i> by Attorney Brandon J. Crainer on behalf of Defendants Werner Enterprises, Inc., Drivers Management, LLC, Werner Enterprises, Inc. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Crainer, Brandon) (Entered: 01/08/2020)
01/10/2020	<u>66</u>	NOTICE of <i>Service of Discovery Responses</i> by Attorney Emily Keatley on behalf of Plaintiffs Equal Employment Opportunity Commission, Equal Employment Opportunity Commission Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Keatley, Emily) (Entered: 01/10/2020)
01/15/2020	<u>67</u>	Certificate of <i>Service of Objections to Subpoenas Duces Tecum issued by Defendants to FMCSA</i> by Attorney Emily Keatley on behalf of Plaintiffs Equal Employment Opportunity Commission, Equal Employment Opportunity Commission.Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Keatley, Emily) (Entered: 01/15/2020)
01/17/2020	<u>68</u>	NOTICE of <i>Serving Discovery Responses</i> by Attorney Brandon J. Crainer on behalf of Defendants Werner Enterprises, Inc., Drivers Management, LLC, Werner Enterprises, Inc. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Crainer, Brandon) (Entered: 01/17/2020)
01/24/2020	<u>69</u>	NOTICE of <i>Serving Discovery Responses</i> by Attorney Brandon J. Crainer on behalf of Defendants Werner Enterprises, Inc., Drivers Management, LLC, Werner Enterprises, Inc. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Crainer, Brandon) (Entered: 01/24/2020)
02/03/2020	70	TEXT ORDER: On the Court's own motion, the telephonic Status Conference currently set for 6/24/20 is continued to 6/25/2020 at 03:00 pm before Magistrate Judge Susan M. Bazis. Counsel shall use the conferencing instructions assigned to this case to participate in the conference. Ordered by Magistrate Judge Susan M. Bazis. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB (RMW) (Entered: 02/03/2020)
02/05/2020	<u>71</u>	NOTICE of Appearance by Attorney Meredith S. Berwick on behalf of Plaintiff Equal Employment Opportunity Commission (Berwick, Meredith) (Entered: 02/05/2020)
02/05/2020	<u>72</u>	Certificate of <i>Service of Objections to Subpoenas Duces Tecum Issued by Defendants to Andrew Deuschle and Victor Robinson's Employers</i> by Attorney Meredith S. Berwick on behalf of Plaintiff Equal Employment Opportunity Commission.Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Berwick, Meredith) (Entered: 02/05/2020)
02/07/2020	<u>73</u>	NOTICE to Take Deposition of Andrew Deuschle by Attorney Joseph E. Jones on behalf of Defendants Werner Enterprises, Inc., Drivers Management, LLC, Werner Enterprises, Inc. Member Cases: 8:18-cv-00329-JMG-SMB,

		8:18-cv-00462-JMG-SMB(Jones, Joseph) (Entered: 02/07/2020)
02/07/2020	<u>74</u>	NOTICE to Take Deposition of Victor M. Robinson by Attorney Joseph E. Jones on behalf of Defendants Werner Enterprises, Inc., Drivers Management, LLC, Werner Enterprises, Inc. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Jones, Joseph) (Entered: 02/07/2020)
02/12/2020	<u>75</u>	UNOPPOSED MOTION to Extend <i>Third Amended Progression Order Deadlines Regarding Expert Disclosures</i> by Attorney Emily Keatley on behalf of Plaintiffs Equal Employment Opportunity Commission, Equal Employment Opportunity Commission. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Keatley, Emily) (Entered: 02/12/2020)
02/13/2020	76	TEXT ORDER granting <u>75</u> Unopposed Motion to Extend. Plaintiff and Intervenor shall identify expert witnesses and make complete expert disclosures by February 21, 2020. Defendants shall identify expert witnesses and make complete expert disclosures by April 3, 2020. Ordered by Magistrate Judge Susan M. Bazis. (LRH) (Entered: 02/13/2020)
02/14/2020	<u>77</u>	NOTICE of <i>Service of Discovery Responses</i> by Attorney Emily Keatley on behalf of Plaintiffs Equal Employment Opportunity Commission, Equal Employment Opportunity Commission Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Keatley, Emily) (Entered: 02/14/2020)
02/20/2020	<u>78</u>	NOTICE of <i>Service of Supplemental Discovery Responses</i> by Attorney Emily Keatley on behalf of Plaintiffs Equal Employment Opportunity Commission, Equal Employment Opportunity Commission Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Keatley, Emily) (Entered: 02/20/2020)
02/21/2020	<u>79</u>	NOTICE of <i>Service of Supplemental Discovery Responses</i> by Attorney Emily Keatley on behalf of Plaintiffs Equal Employment Opportunity Commission, Equal Employment Opportunity Commission Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Keatley, Emily) (Entered: 02/21/2020)
02/21/2020	<u>80</u>	NOTICE of <i>Service of Rule 26 Expert Disclosures & Reports</i> by Attorney Emily Keatley on behalf of Plaintiffs Equal Employment Opportunity Commission, Equal Employment Opportunity Commission Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Keatley, Emily) (Entered: 02/21/2020)
02/24/2020	81	TEXT EMAIL MOTION for telephone conference to discuss depositions. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(RMW) (Entered: 02/24/2020)
02/24/2020	82	ORDER granting (81) Email Motion in Case No. 18CV462 and (109) in Case No. 8:18CV329. A Telephone Conference to discuss depositions will be held 2/24/2020 at 04:20 PM before Magistrate Judge Susan M. Bazis. Ordered by Magistrate Judge Susan M. Bazis. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(RMW) Modified on 2/25/2020 (LRH). Modified on 2/25/2020 (LRH). (Entered: 02/24/2020)
02/24/2020	85	TEXT MINUTE ENTRY for proceedings held before Magistrate Judge Susan M. Bazis. Telephone Conference held on 2/24/2020. (RMW) (Entered: 03/02/2020)
02/25/2020	83	TEXT ORDER – Following a telephone conference with counsel, it is ordered that the depositions scheduled for February 26, 2020 will not go forward as previously scheduled due to an issue with Defendant's counsel. Counsel shall meet and confer to

		reschedule the depositions. Plaintiff and Intervenor may submit a motion seeking reimbursement of deposition costs and expenses. Ordered by Magistrate Judge Susan M. Bazis. (LRH) (Entered: 02/25/2020)
02/26/2020	<u>84</u>	NOTICE of <i>Service – 4th Set of Interrogatories</i> by Attorney Grant R. Doty on behalf of Plaintiff Equal Employment Opportunity Commission (Doty, Grant) (Entered: 02/26/2020)
03/04/2020	<u>86</u>	NOTICE of <i>Service of Plaintiff EEOC's Second Supp Response to Defendants' Rog #17</i> by Attorney Grant R. Doty on behalf of Plaintiffs Equal Employment Opportunity Commission, Equal Employment Opportunity Commission Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Doty, Grant) (Entered: 03/04/2020)
03/09/2020	<u>87</u>	NOTICE to Take Deposition of Andrew Deuschle <i>AMENDED</i> by Attorney Brandon J. Crainer on behalf of Defendants Werner Enterprises, Inc., Drivers Management, LLC, Werner Enterprises, Inc. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Crainer, Brandon) (Entered: 03/09/2020)
03/09/2020	<u>88</u>	NOTICE to Take Deposition of Victor M. Robinson <i>AMENDED</i> by Attorney Brandon J. Crainer on behalf of Defendants Werner Enterprises, Inc., Drivers Management, LLC, Werner Enterprises, Inc. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Crainer, Brandon) (Entered: 03/09/2020)
03/09/2020	<u>89</u>	NOTICE of <i>Serving Discovery Sixth Supplemental Responses</i> by Attorney Brandon J. Crainer on behalf of Defendants Werner Enterprises, Inc., Drivers Management, LLC, Werner Enterprises, Inc. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Crainer, Brandon) (Entered: 03/09/2020)
03/09/2020	<u>90</u>	NOTICE of <i>2nd Supp / Amended Initial Disclosures</i> by Attorney Grant R. Doty on behalf of Plaintiff Equal Employment Opportunity Commission (Doty, Grant) (Entered: 03/09/2020)
03/20/2020	<u>91</u>	NOTICE of <i>Serving Discovery Seventh Supplemental Responses</i> by Attorney Brandon J. Crainer on behalf of Defendants Werner Enterprises, Inc., Drivers Management, LLC, Werner Enterprises, Inc. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Crainer, Brandon) (Entered: 03/20/2020)
03/23/2020	<u>92</u>	JOINT MOTION for Attorney Fees <i>and travel costs and expenses due to cancelled depositions</i> by Attorney Grant R. Doty on behalf of Intervenor Plaintiff Andrew Deuschle, Plaintiffs Equal Employment Opportunity Commission, Equal Employment Opportunity Commission. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Doty, Grant) (Entered: 03/23/2020)
03/23/2020	<u>93</u>	BRIEF in support of JOINT MOTION for Attorney Fees <i>and travel costs and expenses due to cancelled depositions</i> (92 in 8:18-cv-00462-JMG-SMB, 123 in 8:18-cv-00329-JMG-SMB) by Attorney Grant R. Doty on behalf of Intervenor Plaintiff Andrew Deuschle, Plaintiffs Equal Employment Opportunity Commission, Equal Employment Opportunity Commission. (Attachments: # <u>1</u> Exhibit A – Decl of Doty (each declaration with attached Tabs), # <u>2</u> Exhibit B – Decl of Keatley, # <u>3</u> Exhibit C – Decl of Berwick, # <u>4</u> Exhibit D – Decl of East,

		<p># <u>5</u> Exhibit E – Decl of Davis, # <u>6</u> Exhibit F – Decl of Deuschle, # <u>7</u> Exhibit G – Decl of Robinson)Member Cases: 8:18–cv–00329–JMG–SMB, 8:18–cv–00462–JMG–SMB(Doty, Grant) (Entered: 03/23/2020)</p>
03/25/2020	94	<p>TEXT ORDER: A discovery dispute has arisen in this case. A telephone conference to discuss the dispute will be held on April 6, 2020 at 10:00 a.m. CDT. Counsel for Plaintiff and Intervenor Plaintiff shall submit short position statements, no more than 2 pages, via email to chambers at bazis@ned.uscourts.gov no later than 12:00 p.m. on Wednesday, April 1, 2020. Case conference instructions are found at Filing No. <u>28</u> (18cv329) and found at Filing No. <u>15</u> (18cv462). Member Cases: 8:18–cv–00329–JMG–SMB, 8:18–cv–00462–JMG–SMB Ordered by Magistrate Judge Susan M. Bazis. (RMW) (Entered: 03/25/2020)</p>
03/27/2020	<u>95</u>	<p>NOTICE of <i>Serving Discovery Responses</i> by Attorney Brandon J. Crainer on behalf of Defendants Werner Enterprises, Inc., Drivers Management, LLC, Werner Enterprises, Inc. Member Cases: 8:18–cv–00329–JMG–SMB, 8:18–cv–00462–JMG–SMB(Crainer, Brandon) (Entered: 03/27/2020)</p>
04/01/2020	<u>96</u>	<p>UNOPPOSED MOTION to Extend <i>Certain Progression Order Deadlines</i> by Attorney Elizabeth A. Culhane on behalf of Defendants Werner Enterprises, Inc., Drivers Management, LLC, Werner Enterprises, Inc..Member Cases: 8:18–cv–00329–JMG–SMB, 8:18–cv–00462–JMG–SMB(Culhane, Elizabeth) (Entered: 04/01/2020)</p>
04/06/2020	<u>97</u>	<p>FOURTH AMENDED FINAL PROGRESSION ORDER – The trial and pretrial conference will not be reset at this time. The status conference to discuss case progression, the parties' interest in settlement, and the trial and pretrial conference settings remains as scheduled with the undersigned magistrate judge by telephone conference on June 25, 2020 at 3:00 p.m. Counsel shall use the conferencing instructions assigned to this case to participate in the conference. (Filing No. <u>15</u> .) The non– expert deposition deadline is May 20, 2020. The expert deposition deadline is June 26, 2020. Ordered by Magistrate Judge Susan M. Bazis. (LKO) (Entered: 04/06/2020)</p>
04/06/2020	98	<p>TEXT MINUTE ENTRY for proceedings held before Magistrate Judge Susan M. Bazis. Telephone Conference held on 4/6/2020. Member Cases: 8:18–cv–00329–JMG–SMB, 8:18–cv–00462–JMG–SMB (LRH) (Entered: 04/06/2020)</p>
04/06/2020	99	<p>TEXT ORDER – A telephone conference regarding a discovery dispute was held on April 6, 2020. Following discussion, it is ordered that the deadline for filing motions to compel is extended to April 14, 2020. If another discovery dispute is not resolved before the April 14, 2020 deadline, the parties shall contact chambers by that deadline. Defendants may subpoena claimants' employment files from former employers. Plaintiff or claimants shall contact claimants' current employers to obtain employment files. The subpoena to Camelback Church of Christ is limited to dates of employment, pay, and benefits. If claimant's job duties for Penguin Random House, did not include driving, the subpoena to that employer shall also be limited to dates of employment, pay, and benefits. By April 13, 2020, Plaintiffs shall sign the waivers provided by Werner Enterprises regarding the records from the Federal Motor Carrier Administration. If the waivers cannot be signed, Plaintiff shall contact Werner by April 13, 2020. Werner will then send a proposed order to the Court to obtain the records. Member Cases: 8:18–cv–00329–JMG–SMB,</p>

		8:18-cv-00462-JMG-SMB Ordered by Magistrate Judge Susan M. Bazis. (LRH) (Entered: 04/06/2020)
04/06/2020	<u>100</u>	BRIEF in opposition to JOINT MOTION for Attorney Fees <i>and travel costs and expenses due to cancelled depositions</i> (92 in 8:18-cv-00462-JMG-SMB) by Attorney Brandon J. Crainer on behalf of Defendants Werner Enterprises, Inc., Drivers Management, LLC, Werner Enterprises, Inc..Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Crainer, Brandon) (Entered: 04/06/2020)
04/06/2020	<u>101</u>	INDEX in support of Brief, (100 in 8:18-cv-00462-JMG-SMB) by Attorney Brandon J. Crainer on behalf of Defendants Werner Enterprises, Inc., Drivers Management, LLC, Werner Enterprises, Inc.. (Attachments: # <u>1</u> Declaration of Joseph E. Jones, # <u>2</u> Declaration of Brandon J. Crainer, # <u>3</u> 2-A, October 7, 2019, Email;, # <u>4</u> Exhibit 2-B, October 25, 2019, Email, # <u>5</u> Exhibit 2-C, November 6, 2017, Email, # <u>6</u> Exhibit 2-D, November 19, 2019, Email, # <u>7</u> Exhibit 2-E, January 8, 2020, Email;, # <u>8</u> Exhibit 2-F, January 15 & 22, 2020, Emails, # <u>9</u> Exhibit 2-G, January 23, 2020, Email, # <u>10</u> Exhibit 2-H, February 3, 2020, Email, # <u>11</u> Exhibit 2-I, February 24, 2020, Email No. 1, # <u>12</u> Exhibit 2-J, February 24, 2020, Email No. 2;, # <u>13</u> Exhibit 2-K, February 24, 2020, Email No. 3, # <u>14</u> Exhibit 2-L, February 24, 2020, Email No. 4, # <u>15</u> Exhibit 2-M, February 24, 2020, Email No. 5)Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Crainer, Brandon) (Entered: 04/06/2020)
04/10/2020	<u>102</u>	NOTICE of <i>Service of Werner Enterprises, Inc. and Drivers Management, LLC's Rule 26 Expert Disclosures</i> by Attorney Brandon J. Crainer on behalf of Defendants Werner Enterprises, Inc., Drivers Management, LLC, Werner Enterprises, Inc. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Crainer, Brandon) (Entered: 04/10/2020)
04/13/2020	<u>103</u>	REPLY BRIEF in support of JOINT MOTION for Attorney Fees <i>and travel costs and expenses due to cancelled depositions</i> (92 in 8:18-cv-00462-JMG-SMB, 123 in 8:18-cv-00329-JMG-SMB) by Attorney Grant R. Doty on behalf of Intervenor Plaintiff Andrew Deuschle, Plaintiffs Equal Employment Opportunity Commission, Equal Employment Opportunity Commission. (Attachments: # <u>1</u> Exhibit 1- Affidavit of Grant Doty (with Tab 1 - Email, dated March 5, 2020))Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Doty, Grant) (Entered: 04/13/2020)
04/14/2020	<u>104</u>	REPLY BRIEF in support of JOINT MOTION for Attorney Fees <i>and travel costs and expenses due to cancelled depositions</i> (92 in 8:18-cv-00462-JMG-SMB, 123 in 8:18-cv-00329-JMG-SMB) [<i>Amended/Corrected Brief (amending/correcting Doc. # 134)</i>] by Attorney Grant R. Doty on behalf of Intervenor Plaintiff Andrew Deuschle, Plaintiffs Equal Employment Opportunity Commission, Equal Employment Opportunity Commission. (Attachments: # <u>1</u> Exhibit 1- Affidavit of Grant Doty (with Tab 1 - Email, dated March 5,

		2020))Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Doty, Grant) (Entered: 04/14/2020)
04/14/2020	<u>105</u>	Certificate of Service of Objections to Subpoena Duces Tecum Issued by Defendants to Victor Robinson's Medical Provider by Attorney Meredith S. Berwick on behalf of Plaintiff Equal Employment Opportunity Commission.(Berwick, Meredith) (Entered: 04/14/2020)
04/15/2020	106	TEXT ORDER: A discovery dispute has arisen in this case. A telephone conference to discuss the dispute will be held on April 29, 2020 at 10:30 a.m. The parties shall submit position statements (no longer than 2 pages) to bazis@ned.uscourts.gov by 12:00 p.m. on April 24, 2020. The parties must meet and confer in advance of submission of position statements. Case conference instructions are found at Filing No. <u>28</u> (18cv329) and found at Filing No. <u>15</u> (18cv462). Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMBOrdered by Magistrate Judge Susan M. Bazis. (RMW) (Entered: 04/15/2020)
04/18/2020	<u>107</u>	NOTICE of Service of Plaintiff's 3d Supp Initial Disclosures by Attorney Grant R. Doty on behalf of Plaintiff Equal Employment Opportunity Commission (Doty, Grant) (Entered: 04/18/2020)
04/20/2020	<u>108</u>	NOTICE of Service of Discovery Supplementation by Attorney Grant R. Doty on behalf of Plaintiffs Equal Employment Opportunity Commission, Equal Employment Opportunity Commission Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Doty, Grant) (Entered: 04/20/2020)
04/22/2020	<u>109</u>	NOTICE to Take Deposition of Erin Marsh on May 12, 2020 by Attorney Grant R. Doty on behalf of Plaintiff Equal Employment Opportunity Commission (Doty, Grant) (Entered: 04/22/2020)
04/22/2020	<u>110</u>	NOTICE to Take Deposition of Rich Johnson on May 13, 2020 by Attorney Grant R. Doty on behalf of Plaintiff Equal Employment Opportunity Commission (Doty, Grant) (Entered: 04/22/2020)
04/24/2020	<u>111</u>	NOTICE to Take Deposition of Defendants Drivers Management and Werners – 30(b)(6) by Attorney Grant R. Doty on behalf of Plaintiff Equal Employment Opportunity Commission (Doty, Grant) (Entered: 04/24/2020)
04/29/2020	112	TEXT ORDER – A telephone conference was held regarding a discovery dispute. Upon consideration, it is ordered that Plaintiff shall serve amended written discovery upon Werner regarding the late-produced documents by May 8, 2020. Werner shall respond within 30 days of service. By May 6, 2020, Werner shall provide search terms and databases that were searched for discovery produced in spring of 2019 and routing searches. The written discovery, deposition, and motion to compel deadlines are continued to September 18, 2020. Once Plaintiff receives written discovery responses, the parties shall confer regarding any depositions that need to take place. Ordered by Magistrate Judge Susan M. Bazis. (LRH) (Entered: 04/29/2020)
04/30/2020	<u>113</u>	NOTICE of regarding Notice to Take Deposition <u>109</u> –withdrawing deposition notice for Ms. Marsh (May 12, 2020) by Attorney Grant R. Doty on behalf of Plaintiff Equal Employment Opportunity Commission (Doty, Grant) (Entered: 04/30/2020)
04/30/2020	<u>114</u>	NOTICE of regarding Notice to Take Deposition <u>110</u> –withdrawing deposition notice for Mr. Johnson (May 13, 2020) by Attorney Grant R. Doty on behalf of

		Plaintiff Equal Employment Opportunity Commission (Doty, Grant) (Entered: 04/30/2020)
04/30/2020	<u>115</u>	NOTICE of regarding Notice to Take Deposition <u>111</u> – <i>withdrawing 30(b)(6) deposition notice for Defendants (May 14 7, 2020)</i> by Attorney Grant R. Doty on behalf of Plaintiff Equal Employment Opportunity Commission (Doty, Grant) (Entered: 04/30/2020)
05/08/2020	<u>116</u>	NOTICE of <i>Service of Discovery Requests (5ROG and 7RFP)</i> by Attorney Grant R. Doty on behalf of Plaintiff Equal Employment Opportunity Commission (Doty, Grant) (Entered: 05/08/2020)
05/13/2020	<u>117</u>	NOTICE of <i>Service of Plaintiffs' two Expert Rebuttal Reports (Dr. Arndt and Mr. Olds)</i> by Attorney Grant R. Doty on behalf of Plaintiffs Equal Employment Opportunity Commission, Equal Employment Opportunity Commission Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Doty, Grant) (Entered: 05/13/2020)
05/27/2020	<u>118</u>	ORDER – that the Joint Motion of Plaintiff and Intervenor for Reimbursement of Expenses and Fees Associated with Cancelled Depositions (Case No. 8:18CV329, Filing No. 123 ; Case No. 8:18CV426, Filing No. <u>92</u>) is granted, in part. Upon the conclusion of this litigation, Werner shall pay \$4,978.30 to cover the costs of travel for the cancelled depositions. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB Ordered by Magistrate Judge Susan M. Bazis. (LKO) (Entered: 05/27/2020)
06/16/2020	<u>119</u>	NOTICE to Take Deposition of WILLIAM C. ADAMS , <i>Defendant's expert, in Harrisburg, PA (remotely) on June 23, 2020</i> by Attorney Grant R. Doty on behalf of Plaintiff Equal Employment Opportunity Commission (Doty, Grant) (Entered: 06/16/2020)
06/22/2020	120	TEXT ORDER: On the Court's own motion, the Status Conference presently set for 6/25/2020 at 3:00 PM is rescheduled to 6/29/2020 at 04:00 PM by telephone before Magistrate Judge Susan M. Bazis. Case conference instructions are found at Filing No. <u>28</u> (18cv329) and found at Filing No. <u>15</u> (18cv462). Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB Ordered by Magistrate Judge Susan M. Bazis. (RMW) (Entered: 06/22/2020)
06/30/2020	121	TEXT MINUTE ENTRY for proceedings held before Magistrate Judge Susan M. Bazis Status Conference held on 6/29/2020. Summary Judgment and Daubert deadlines are extended to 11/17/2020. The next Status Conference will be held on 9/23/2020 at 11:00 AM by telephone before Magistrate Judge Susan M. Bazis. Case conference instructions are found at Filing No. 28 (18cv329) and found at Filing No. <u>15</u> (18cv462). Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB (RMW) (Entered: 06/30/2020)
08/06/2020	122	TEXT ORDER A discovery dispute has arisen in this matter. A telephone conference before Magistrate Judge Susan M. Bazis will be held on August 14, 2020, at 1:00 p.m. to discuss the matter. By 12:00 p.m. on August 10, 2020, the parties shall submit brief position statements (no longer than 4 pages) to bazis@ned.uscourts.gov. Case conference instructions are found at Filing No. 28 (18cv329) and found at Filing No. 15 (18cv462). Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB. Ordered by Magistrate Judge Susan M. Bazis. (RMW) (Entered: 08/06/2020)

08/14/2020	123	TEXT MINUTE ENTRY for proceedings held before Magistrate Judge Susan M. Bazis. Telephone Conference held on 8/14/2020. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB (LRH) (Entered: 08/14/2020)
08/14/2020	124	TEXT ORDER – Werner shall perform an ESI search of other databases using the search terms proposed by EEOC/Plaintiffs. Werner shall first identify its databases and describe the documents contained on each database, and then provide this information to EEOC/Plaintiffs. Once this information is provided, the parties shall confer regarding which databases need to be searched with the search terms. EEOC may take Fed. R. Civ. P. 30(b)(6) deposition on topics 6, 7, 8, 39, and 40. EEOC may also re-depose Scott Hollenbeck regarding these topics. EEOC may depose Werner regarding the audit trail data on the routing comment document. The written discovery, deposition and motion to compel deadlines are extended to November 30, 2020. Robinson shall sign the authorization for release for Aspire Indiana Health records. The authorization shall be signed by Robinson within 5 days and provided to Werner within 7 days. Werner may issue the subpoena to Dr. Tricia Lynn Wright for Robinson's medical records pertaining to high blood pressure. Werner shall provide the documents produced by Aspire Indiana Health to EEOC/Plaintiffs within 10 days of receipt. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB Ordered by Magistrate Judge Susan M. Bazis. (LRH) (Entered: 08/14/2020)
08/14/2020	<u>125</u>	RESTRICTED AUDIO FILE (22.2 MB) regarding Telephone Conference (123 in 8:18-cv-00462-JMG-SMB, 149 in 8:18-cv-00329-JMG-SMB) held on 8/14/2020 at 1:00 p.m. before Magistrate Judge Susan M. Bazis. ACCESS TO THE PDF DOCUMENT IS RESTRICTED TO CASE PARTICIPANTS AND THE COURT PURSUANT TO THE E-GOVERNMENT ACT AND FEDERAL RULE OF CIVIL PROCEDURE 5.2(e). Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB (KLF) (Entered: 08/14/2020)
09/23/2020	126	TEXT EMAIL MOTION of the parties to continue the status conference presently set for 9/23/20 at 11:00 a.m. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB (RMW) (Entered: 09/23/2020)
09/23/2020	127	ORDER granting (152) Email Motion in case 8:18-cv-00329-JMG-SMB. Status Conference continued to 11/2/2020 at 09:00 AM by telephone before Magistrate Judge Susan M. Bazis. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB Ordered by Magistrate Judge Susan M. Bazis. (RMW) (Entered: 09/23/2020)
09/23/2020	128	ORDER granting 126 Email Motion. Status Conference continued to 11/2/2020 at 09:00 AM by telephone before Magistrate Judge Susan M. Bazis. Case conference instructions are found at Filing No. <u>28</u> 18cv329 and found at Filing No. <u>15</u> 18cv462. Ordered by Magistrate Judge Susan M. Bazis. (RMW) (Entered: 09/23/2020)
09/23/2020	129	TEXT ORDER: On the Court's own motion, the Status Conference on 11/2/2020 presently set to begin at 9:00 a.m. is rescheduled to begin at 2:00 p.m. by telephone before Magistrate Judge Susan M. Bazis. Case conference instructions are found at Filing No. <u>15</u> . Ordered by Magistrate Judge Susan M. Bazis. (RMW) (Entered: 09/23/2020)
11/02/2020	130	TEXT MINUTE ENTRY for proceedings held before Magistrate Judge Susan M. Bazis. Status Conference held on 11/2/2020. Following discussion, it is ordered that

		all case progression deadlines are stayed until further order of the Court. The next Status Conference will be held on 12/1/2020 at 01:00 PM by telephone before Magistrate Judge Susan M. Bazis. Case conference instructions are found at Filing No. <u>15</u> . (RMW) (Entered: 11/02/2020)
11/23/2020	131	TEXT ORDER: A discovery dispute has arisen in this matter. The dispute will be heard before the undersigned magistrate judge in addition to the previously scheduled status conference on 12/01/2020 at 1:00 p.m. The parties shall each submit a brief position statement, not more than 2 pages, via email to bazis@ned.uscourts.gov by 12:00 p.m. on 11/25/2020. Ordered by Magistrate Judge Susan M. Bazis. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB. (RMW) (Entered: 11/23/2020)
12/01/2020	132	TEXT MINUTE ENTRY for proceedings held before Magistrate Judge Susan M. Bazis. Telephone Conference held on 12/1/2020. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB (LRH) (Entered: 12/01/2020)
12/01/2020	133	TEXT ORDER: A telephone conference regarding a discovery dispute was held on December 1, 2020. Having heard the matter, the Court finds Defendant has already produced the responsive emails and attachments and has, thus, complied with its discovery obligations in that regard. It is ordered that Defendant shall produce more detailed information regarding the database search results and produce relevant documents by January 15, 2021. The next telephone status conference will be held on January 28, 2021 at 1:00 p.m. by telephone before Magistrate Judge Susan M. Bazis. Case conference instructions are found at Filing No. <u>15</u> . Ordered by Magistrate Judge Susan M. Bazis. (RMW) (Entered: 12/01/2020)
12/01/2020	<u>134</u>	RESTRICTED AUDIO FILE (10.2 MB) regarding Telephone Conference 132 held on 12/1/2020 at 1:02 p.m. before Magistrate Judge Susan M. Bazis. ACCESS TO THE PDF DOCUMENT IS RESTRICTED TO CASE PARTICIPANTS AND THE COURT PURSUANT TO THE E-GOVERNMENT ACT AND FEDERAL RULE OF CIVIL PROCEDURE 5.2(e). (KLF) (Entered: 12/01/2020)
01/14/2021	<u>135</u>	MOTION to Withdraw as Attorney by Attorney Elizabeth A. Culhane on behalf of Defendants Werner Enterprises, Inc., Drivers Management, LLC, Werner Enterprises, Inc..Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Culhane, Elizabeth) (Entered: 01/14/2021)
01/15/2021	<u>136</u>	NOTICE of Appearance by Attorney Patrick J. Barrett on behalf of Defendants Werner Enterprises, Inc., Drivers Management, LLC, Werner Enterprises, Inc. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Barrett, Patrick) (Entered: 01/15/2021)
01/15/2021	137	TEXT ORDER granting <u>135</u> Motion to Withdraw as Attorney. Joseph E. Jones is terminated as counsel of record. Ordered by Magistrate Judge Susan M. Bazis. (LRH) (Entered: 01/15/2021)
01/27/2021	138	TEXT ORDER: A discovery dispute has arisen in this case. A telephone conference to discuss the matter will be held on 2/4/2021 at 11:00 a.m. before the undersigned magistrate judge. Defendants shall submit a one-page position statement regarding the discovery dispute via email to bazis@ned.uscourts.gov no later than 12:00 p.m. on 2/1/2021. The status conference presently scheduled for 1/28/2021 at 1:00 p.m. is canceled. Case status will be discussed during the 2/4/2021 telephone conference. Telephone conference instructions are found at Filing No. <u>15</u> . Ordered by Magistrate

		Judge Susan M. Bazis. (RMW) (Entered: 01/27/2021)
02/04/2021	139	TEXT MINUTE ENTRY for proceedings held before Magistrate Judge Susan M. Bazis. Telephone Conference held on 2/4/2021. (LRH) (Entered: 02/04/2021)
02/04/2021	140	TEXT ORDER A telephone conference was held regarding a discovery dispute. Upon hearing the matter, the Court orders that the EEOC shall provide a list of documents to Werner that the EEOC maintains it is entitled to. The EEOC shall provide this list to Werner by March 1, 2021 . Werner shall respond to this list within four weeks of receipt by either producing documents or by providing an explanation as to why the document was not produced. The parties shall continue to meet and confer to complete this portion of discovery. A telephone conference will be held at 11:00 a.m. on April 14, 2021 to discuss the status of this case. Case conference instructions are found at Filing No. <u>15</u> . Ordered by Magistrate Judge Susan M. Bazis. (RMW) (Entered: 02/04/2021)
02/04/2021	<u>141</u>	RESTRICTED AUDIO FILE (13.2 MB) regarding Telephone Conference (<u>164</u> in 8:18-cv-00329-JMG-SMB, 139 in 8:18-cv-00462-JMG-SMB) held on 2/4/2021 at 11:00 a.m. before Magistrate Judge Susan M. Bazis. ACCESS TO THE PDF DOCUMENT IS RESTRICTED TO CASE PARTICIPANTS AND THE COURT PURSUANT TO THE E-GOVERNMENT ACT AND FEDERAL RULE OF CIVIL PROCEDURE 5.2(e). Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB (KLF) (Entered: 02/04/2021)
02/24/2021	<u>142</u>	MOTION to Withdraw as Attorney by Attorney Brandon J. Crainer on behalf of Defendants Werner Enterprises, Inc., Drivers Management, LLC, Werner Enterprises, Inc..Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Crainer, Brandon) (Entered: 02/24/2021)
02/25/2021	143	TEXT ORDER granting <u>142</u> Motion to Withdraw as Attorney. Brandon Crainer is terminated as counsel of record. Ordered by Magistrate Judge Susan M. Bazis. (LRH) (Entered: 02/25/2021)
02/25/2021	<u>144</u>	MOTION to Withdraw as Attorney (<i>Emily Keatley</i>) by Attorney Meredith S. Berwick on behalf of Plaintiffs Equal Employment Opportunity Commission, Equal Employment Opportunity Commission.Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Berwick, Meredith) (Entered: 02/25/2021)
02/26/2021	145	TEXT ORDER granting <u>144</u> Motion to Withdraw as Attorney. Emily Keatley is terminated as counsel of record. Ordered by Magistrate Judge Susan M. Bazis. (LRH) (Entered: 02/26/2021)
03/31/2021	<u>146</u>	NOTICE of Appearance <i>Entry of Appearance</i> by Attorney Sarah L. McGill on behalf of Defendants Werner Enterprises, Inc., Drivers Management, LLC, Werner Enterprises, Inc. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(McGill, Sarah) (Entered: 03/31/2021)
03/31/2021	<u>147</u>	NOTICE of <i>Service</i> by Attorney Sarah L. McGill on behalf of Defendants Werner Enterprises, Inc., Drivers Management, LLC, Werner Enterprises, Inc. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(McGill, Sarah) (Entered: 03/31/2021)
04/14/2021	148	TEXT MINUTE ENTRY for proceedings held before Magistrate Judge Susan M. Bazis. Status Conference held on 4/14/2021. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB (LRH) (Entered: 04/14/2021)

		04/14/2021)
04/14/2021	149	TEXT ORDER – A telephone status conference was held on April 14, 2021. The parties shall continue to meet and confer and submit proposed case progression deadlines to bazis@ned.uscourts.gov by April 28, 2021. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB Ordered by Magistrate Judge Susan M. Bazis. (LRH) (Entered: 04/14/2021)
04/19/2021	<u>150</u>	NOTICE of <i>SERVICE</i> by Attorney Elizabeth A. Culhane on behalf of Defendants Drivers Management, LLC, Werner Enterprises, Inc. (Culhane, Elizabeth) (Entered: 04/19/2021)
04/26/2021	<u>151</u>	NOTICE of <i>SERVICE</i> by Attorney Elizabeth A. Culhane on behalf of Defendants Werner Enterprises, Inc., Drivers Management, LLC, Werner Enterprises, Inc. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Culhane, Elizabeth) (Entered: 04/26/2021)
04/28/2021	<u>152</u>	FIFTH AMENDED FINAL PROGRESSION ORDER – Depositions due 8/13/21. The trial and pretrial conference will not be reset at this time. The status conference to discuss case progression, the parties' interest in settlement, and the trial and pretrial conference settings will be held before the undersigned magistrate judge by telephone conference on September 9, 2021 at 2:00 p.m. Counsel shall use the conferencing instructions assigned to this case to participate in the conference. (Filing No. <u>15</u> .) Ordered by Magistrate Judge Susan M. Bazis. (LKO) (Entered: 04/28/2021)
04/30/2021	<u>153</u>	NOTICE of <i>SERVICE</i> by Attorney Elizabeth A. Culhane on behalf of Defendants Werner Enterprises, Inc., Drivers Management, LLC, Werner Enterprises, Inc. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Culhane, Elizabeth) (Entered: 04/30/2021)
05/05/2021	<u>154</u>	NOTICE of <i>SERVICE</i> by Attorney Elizabeth A. Culhane on behalf of Defendants Werner Enterprises, Inc., Drivers Management, LLC, Werner Enterprises, Inc. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Culhane, Elizabeth) (Entered: 05/05/2021)
05/12/2021	<u>155</u>	NOTICE to Take Deposition of Rich Johnson (<i>June 4, 2021; 1 p.m.</i>) by Attorney Grant R. Doty on behalf of Plaintiff Equal Employment Opportunity Commission (Doty, Grant) (Entered: 05/12/2021)
05/12/2021	<u>156</u>	NOTICE to Take Deposition of Erin Marsh (<i>June 22, 2021; 1 p.m.</i>) by Attorney Grant R. Doty on behalf of Plaintiff Equal Employment Opportunity Commission (Doty, Grant) (Entered: 05/12/2021)
05/25/2021	<u>157</u>	NOTICE of <i>SERVICE</i> by Attorney Elizabeth A. Culhane on behalf of Defendants Werner Enterprises, Inc., Drivers Management, LLC, Werner Enterprises, Inc. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Culhane, Elizabeth) (Entered: 05/25/2021)
06/02/2021	158	TEXT ORDER – Upon the request of the parties, the motion to compel deadline is extended to June 18, 2021. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB Ordered by Magistrate Judge Susan M. Bazis. (LRH) (Entered: 06/02/2021)
06/29/2021	159	TEXT ORDER: A discovery dispute has arisen in this case. A telephone conference to discuss the matter will be held on 7/13/2021 at 02:00 PM before Magistrate Judge Susan M. Bazis. Case conference instructions are found at Filing No. 28 (18cv329)

		and found at Filing No. 15 (18cv462). Ordered by Magistrate Judge Susan M. Bazis. (RMW) (Entered: 06/29/2021)
07/09/2021	<u>160</u>	NOTICE to Take Deposition of Scott Hollenbeck (<i>August 4, 2021; 9:00 a.m.</i>) by Attorney Grant R. Doty on behalf of Plaintiff Equal Employment Opportunity Commission (Doty, Grant) (Entered: 07/09/2021)
07/09/2021	<u>161</u>	NOTICE to Take Deposition of Defendants Drivers Management and Werner Enterprises – 30(b)(6) <i>pursuant to Court Order Doc. # 124, Aug 14, 2020 (August 4, 2021 at 2 p.m.)</i> by Attorney Grant R. Doty on behalf of Plaintiff Equal Employment Opportunity Commission (Doty, Grant) (Entered: 07/09/2021)
07/09/2021	<u>162</u>	NOTICE to Take Deposition of Western Express, Inc. – 30(b)(6) (<i>August 13, 2021; 11 a.m. Local</i>) by Attorney Grant R. Doty on behalf of Plaintiff Equal Employment Opportunity Commission (Doty, Grant) (Entered: 07/09/2021)
07/09/2021	<u>163</u>	NOTICE to Take Deposition of Swift Transportation Co., Inc – 30(b)(6) (<i>August 12, 2021; 9:00 a.m. Local</i>) by Attorney Grant R. Doty on behalf of Plaintiff Equal Employment Opportunity Commission (Doty, Grant) (Entered: 07/09/2021)
07/09/2021	<u>164</u>	NOTICE to Take Deposition of J.B. Hunt Transport, Inc. – 30(b)(6) (<i>August 13, 2021; 8:00 a.m. Local</i>) by Attorney Grant R. Doty on behalf of Plaintiff Equal Employment Opportunity Commission (Doty, Grant) (Entered: 07/09/2021)
07/13/2021	165	TEXT MINUTE ENTRY for proceedings held before Magistrate Judge Susan M. Bazis. Telephone Conference held on 7/13/2021. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB (LRH) (Entered: 07/13/2021)
07/13/2021	166	TEXT ORDER – A telephone conference was held regarding a discovery dispute. By July 16, 2021, Plaintiff shall serve a request for production seeking the application files for the six individuals listed in Plaintiff's discovery dispute submission to the Court. Defendant shall produce the requested documents by August 16, 2021. The deposition deadline is extended to October 15, 2021. The summary judgment deadline is extended to November 15, 2021. Defendant will produce documents at issue related to Keith Drown and Floyd McLain to Intervenor. Defendant shall also produce this information pertaining to James Johnson. However, if the documents produced by Defendant in January 2020 indicate multiple hits for James Johnson, Defendant does not need to produce these documents. Defendant does not need to produce audit trail data. If Intervenor has a concern that some application information has not been produced, per the agreement of the parties, Intervenor's counsel shall advise Defendant's counsel as to which individuals he believes documentation is missing. The parties shall meet and confer regarding the issue. Ordered by Magistrate Judge Susan M. Bazis. (LRH) (Entered: 07/13/2021)
07/13/2021	<u>168</u>	RESTRICTED AUDIO FILE (28.7 MB) regarding Telephone Conference(186 in 8:18-cv-00329-JMG-SMB, 165 in 8:18-cv-00462-JMG-SMB) held on 7/13/2021 at 2:00 p.m. before Magistrate Judge Susan M. Bazis. ACCESS TO THE PDF DOCUMENT IS RESTRICTED TO CASE PARTICIPANTS AND THE COURT PURSUANT TO THE E-GOVERNMENT ACT AND FEDERAL RULE OF CIVIL PROCEDURE 5.2(e). Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(SLP) (Entered: 07/14/2021)
07/14/2021	<u>167</u>	NOTICE of <i>Service of Discovery on Defendant -- 9th Request for Production</i> by Attorney Grant R. Doty on behalf of Plaintiff Equal Employment Opportunity

		Commission Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Doty, Grant) (Entered: 07/14/2021)
07/16/2021	<u>169</u>	NOTICE of <i>Service of Discovery on Defendant -- Amended 9th Request for Production</i> by Attorney Grant R. Doty on behalf of Plaintiff Equal Employment Opportunity Commission Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Doty, Grant) (Entered: 07/16/2021)
07/22/2021	<u>170</u>	RETURN of service of Non-Party Subpoena for 30(b)(6) Deposition on July 12, 2021 upon Crete Carrier Corporation by Attorney Grant R. Doty on behalf of Plaintiff Equal Employment Opportunity Commission.Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Doty, Grant) (Entered: 07/22/2021)
07/22/2021	<u>171</u>	RETURN of service of Non-Party Subpoena for 30(b)(6) Deposition on July 12, 2021 upon CR England, Inc. by Attorney Grant R. Doty on behalf of Plaintiff Equal Employment Opportunity Commission.Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Doty, Grant) (Entered: 07/22/2021)
07/22/2021	<u>172</u>	RETURN of service of Non-Party Subpoena for 30(b)(6) Deposition on July 12, 2021 upon JB Hunt Transport, Inc. by Attorney Grant R. Doty on behalf of Plaintiff Equal Employment Opportunity Commission.Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Doty, Grant) (Entered: 07/22/2021)
07/22/2021	<u>173</u>	RETURN of service of Non-Party Subpoena for 30(b)(6) Deposition on July 12, 2021 upon Swift Transportation Co., Inc. by Attorney Grant R. Doty on behalf of Plaintiff Equal Employment Opportunity Commission.Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Doty, Grant) (Entered: 07/22/2021)
07/22/2021	<u>174</u>	RETURN of service of Non-Party Subpoena for 30(b)(6) Deposition on July 12, 2021 upon Western Express, Inc. by Attorney Grant R. Doty on behalf of Plaintiff Equal Employment Opportunity Commission.Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Doty, Grant) (Entered: 07/22/2021)
07/22/2021	<u>175</u>	NOTICE to Take Deposition of Defendants Drivers Management and Werner Enterprises - 30(b)(6) [AMENDED] pursuant to Court Order Doc. # 124, Aug 14, 2020 (August 4, 2021 at 2 p.m.) by Attorney Grant R. Doty on behalf of Plaintiff Equal Employment Opportunity Commission Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Doty, Grant) (Entered: 07/22/2021)
07/22/2021	<u>176</u>	NOTICE to Take Deposition of Covenant Transport, Inc. 30(b)(6) - August 13, 2021 by Attorney Grant R. Doty on behalf of Plaintiff Equal Employment Opportunity Commission Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Doty, Grant) (Entered: 07/22/2021)
07/30/2021	<u>177</u>	RETURN of service of Covenant Transport, Inc. on July 22, 2021 upon Covenant Transport, Inc. by Attorney Grant R. Doty on behalf of Plaintiff Equal Employment Opportunity Commission.Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Doty, Grant) (Entered: 07/30/2021)
07/30/2021	<u>178</u>	

		NOTICE to Take Deposition of Swift Transportation Co., Inc – 30(b)(6) [Amended Notice] by Attorney Grant R. Doty on behalf of Plaintiff Equal Employment Opportunity Commission Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Doty, Grant) (Entered: 07/30/2021)
07/30/2021	<u>179</u>	NOTICE to Take Deposition of DEFENDANTS DRIVERS MANAGEMENT AND WERNER ENTERPRISES, INC. [<i>Second Amended Notice; Topics 39-41; August 23, 2021, at 9 a.m.</i>] by Attorney Grant R. Doty on behalf of Plaintiff Equal Employment Opportunity Commission (Doty, Grant) (Entered: 07/30/2021)
08/17/2021	<u>180</u>	NOTICE of <i>SERVICE</i> by Attorney Elizabeth A. Culhane on behalf of Defendants Werner Enterprises, Inc., Drivers Management, LLC, Werner Enterprises, Inc. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Culhane, Elizabeth) (Entered: 08/17/2021)
08/27/2021	<u>181</u>	NOTICE of <i>Service</i> by Attorney Sarah L. McGill on behalf of Defendants Werner Enterprises, Inc., Drivers Management, LLC Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(McGill, Sarah) (Entered: 08/27/2021)
08/31/2021	<u>182</u>	MOTION to Withdraw as Attorney <i>C. Felix Miller</i> by Attorney Grant R. Doty on behalf of Plaintiffs Equal Employment Opportunity Commission, Equal Employment Opportunity Commission. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Doty, Grant) (Entered: 08/31/2021)
09/01/2021	183	TEXT ORDER granting <u>182</u> Motion to Withdraw as Attorney. C. Felix Miller is terminated as counsel of record. Ordered by Magistrate Judge Susan M. Bazis. (LRH) (Entered: 09/01/2021)
09/09/2021	184	TEXT ORDER: At the request of counsel, the status conference presently scheduled for 9/09/2021 is canceled and is rescheduled to 9/28/2021 at 10:00 AM by telephone before Magistrate Judge Susan M. Bazis. Case conference instructions are found at Filing No. 28 (18cv329) and found at Filing No. 15 (18cv462). Ordered by Magistrate Judge Susan M. Bazis. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB (RMW) (Entered: 09/09/2021)
09/17/2021	<u>185</u>	NOTICE of <i>SERVICE</i> by Attorney Elizabeth A. Culhane on behalf of Defendants Werner Enterprises, Inc., Drivers Management, LLC, Werner Enterprises, Inc. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Culhane, Elizabeth) (Entered: 09/17/2021)
09/22/2021	186	TEXT ORDER: A discovery dispute has arisen in this case. Therefore, the status conference, presently scheduled for 09/28/2021, is continued. The discovery dispute and status conference will be heard together on 10/01/2021 at 10:00 a.m. by telephone before the undersigned Magistrate Judge. Telephone conference instructions are found at Filing No. <u>28</u> (18cv329) and Filing No. <u>15</u> (18cv462). Ordered by Magistrate Judge Susan M. Bazis. Ordered by Magistrate Judge Susan M. Bazis. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB (RMW) (Entered: 09/22/2021)
10/01/2021	187	TEXT MINUTE ENTRY for proceedings held before Magistrate Judge Susan M. Bazis. Telephone Conference held on 10/1/2021. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB (LRH) (Entered: 10/01/2021)

10/01/2021	188	TEXT ORDER – A telephone conference regarding case status and a discovery dispute was held on October 1, 2021. Upon hearing the matter, Plaintiff shall file a motion to compel by November 1, 2021. Defendant shall respond to the motion by December 1, 2021. Plaintiff's reply brief is due December 15, 2021. The deposition, summary judgment, and Daubert deadlines are stayed. These deadlines will be reset following a ruling on the motion. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB Ordered by Magistrate Judge Susan M. Bazis. (LRH) (Entered: 10/01/2021)
10/05/2021	<u>189</u>	RESTRICTED AUDIO FILE (10.0 MB) regarding Status Conference (187 in 8:18-cv-00462-JMG-SMB, <u>207</u> in 8:18-cv-00329-JMG-SMB) held on 10/1/2021 at 10:00 a.m. before Magistrate Judge Susan M. Bazis. ACCESS TO THE PDF DOCUMENT IS RESTRICTED TO CASE PARTICIPANTS AND THE COURT PURSUANT TO THE E-GOVERNMENT ACT AND FEDERAL RULE OF CIVIL PROCEDURE 5.2(e). Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB (KLF) (Entered: 10/05/2021)
10/19/2021	<u>190</u>	REQUEST FOR TRANSCRIPT for proceedings held on August 14, 2020 before Magistrate Judge Susan M. Bazis regarding Minutes, Filing (123 in 8:18-cv-00462-JMG-SMB, 149 in 8:18-cv-00329-JMG-SMB) Telephone Conference by Attorney Meredith S. Berwick on behalf of Plaintiff Equal Employment Opportunity Commission. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Berwick, Meredith) (Entered: 10/19/2021)
10/19/2021	<u>191</u>	EXPEDITED LETTER BY CLERK that a transcript request was sent to Rogene Schroder for transcription regarding Telephone Conference(123 in 8:18-cv-00462-JMG-SMB and 149 in 8:18-cv-00329-JMG-SMB). Transcript ordered by Meredith S. Berwick. ACCESS TO THE PDF DOCUMENT IS RESTRICTED TO CASE PARTICIPANTS AND THE COURT PURSUANT TO THE E-GOVERNMENT ACT AND FEDERAL RULE OF CIVIL PROCEDURE 5.2(a). Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(MKR) (Entered: 10/19/2021)
11/01/2021	<u>192</u>	JOINT MOTION to Compel <i>and for Additional Discovery</i> by Attorney Grant R. Doty on behalf of Intervenor Plaintiff Andrew Deuschle, Plaintiffs Equal Employment Opportunity Commission, Equal Employment Opportunity Commission. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Doty, Grant) (Entered: 11/01/2021)
11/01/2021	<u>193</u>	BRIEF in support of JOINT MOTION to Compel <i>and for Additional Discovery</i> (192 in 8:18-cv-00462-JMG-SMB, 213 in 8:18-cv-00329-JMG-SMB) by Attorney Grant R. Doty on behalf of Intervenor Plaintiff Andrew Deuschle, Plaintiffs Equal Employment Opportunity Commission, Equal Employment Opportunity Commission. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Doty, Grant) (Entered: 11/01/2021)
11/01/2021	<u>194</u>	INDEX in support of JOINT MOTION to Compel <i>and for Additional Discovery</i> (192 in 8:18-cv-00462-JMG-SMB, 213 in 8:18-cv-00329-JMG-SMB) by Attorney Grant R. Doty on behalf of Intervenor Plaintiff Andrew Deuschle, Plaintiffs Equal Employment Opportunity Commission, Equal Employment Opportunity Commission. (Attachments: # <u>1</u> Affidavit A – Brian East (Exs. 1-7), # <u>2</u> Exhibit 1 – Intervenor's 1RFP, # <u>3</u> Exhibit 2 – Intervenor's 1ROG,

		<p># <u>4</u> Exhibit 3 – Werner's response to Intervenor's 1RFP, # <u>5</u> Exhibit 4 – Werner's response to Intervenor's IROG, # <u>6</u> Exhibit 5 – Letter from Intervenor Counsel to Werner Counsel, # <u>7</u> Exhibit 6 – FMCSA List, # <u>8</u> Exhibit 7 – Werner notes on FMCSA List, # <u>9</u> Affidavit B – Grant Doty (Exs. 8–23), # <u>10</u> Exhibit 8 – EEOC's 1RFP, # <u>11</u> Exhibit 9 – Werner responses to EEOC 1RFP, # <u>12</u> Exhibit 10 – Official Transcript of hearing on Aug 14, 2020, # <u>13</u> Exhibit 11 – FMCSA List Agreement (email), # <u>14</u> Exhibit 12 – Werner RCD/ATD (Placeholder – Restricted), # <u>15</u> Exhibit 13 – Werner applications (Placeholder – Restricted), # <u>16</u> Exhibit 14 – Email from Plaintiffs' counsel to Werner's counsel (July 26, 2021), # <u>17</u> Exhibit 15 – Memo from Plaintiffs' counsel to Werner's counsel (Sept 2, 2021), # <u>18</u> Exhibit 16 – McDonald Declaration, # <u>19</u> Exhibit 17 – Werner Dashboard, # <u>20</u> Exhibit 18 – Hollenbeck Deposition Transcript, # <u>21</u> Exhibit 19 – Turner Declaration with Encl. Email, # <u>22</u> Exhibit 20 – Letter from EEOC's counsel to Werner's counsel (Oct 4, 2021), # <u>23</u> Exhibit 21 – Letter from Werner's counsel to Plaintiff's counsel (Oct 11, 2021), # <u>24</u> Exhibit 22 – Letter from Werner's counsel to Plaintiff's counsel (May 6, 2020), # <u>25</u> Exhibit 23 – Email from EEOC's counsel to Werner's counsel (May 20, 2021))Member Cases: 8:18–cv–00329–JMG–SMB, 8:18–cv–00462–JMG–SMB(Doty, Grant) (Entered: 11/01/2021)</p>
11/02/2021	<u>195</u>	<p>JOINT MOTION to restrict access to two exhibits to Plaintiffs' Joint Motion to Compel regarding JOINT MOTION to Compel <i>and for Additional Discovery</i>(192 in 8:18–cv–00462–JMG–SMB, 213 in 8:18–cv–00329–JMG–SMB) (<i>Ex. 12 & Ex. 13</i>) by Attorney Grant R. Doty on behalf of Plaintiffs Equal Employment Opportunity Commission, Equal Employment Opportunity Commission.Member Cases: 8:18–cv–00329–JMG–SMB, 8:18–cv–00462–JMG–SMB(Doty, Grant) (Entered: 11/02/2021)</p>
11/02/2021	<u>196</u>	<p>RESTRICTED DOCUMENT <i>S</i> regarding JOINT MOTION to restrict access to two exhibits to Plaintiffs' Joint Motion to Compel regarding JOINT MOTION to Compel <i>and for Additional Discovery</i>(192 in 8:18–cv–00462–JMG–SMB, 213 in 8:18–cv–00329–JMG–SMB) (<i>Ex. 12 & Ex. 13</i>)(216 in 8:18–cv–00329–JMG–SMB, 195 in 8:18–cv–00462–JMG–SMB) ACCESS TO THE PDF DOCUMENT IS RESTRICTED TO CASE PARTICIPANTS AND THE COURT PURSUANT TO THE E–GOVERNMENT ACT AND FEDERAL RULE OF CIVIL PROCEDURE 5.2(a). – by Attorney Grant R. Doty on behalf of Plaintiffs Equal Employment Opportunity Commission, Equal Employment Opportunity Commission. (Attachments: # <u>1</u> Exhibit C – Doty Declaration regarding Ex. 12 & Ex. 3, # <u>2</u> Exhibit 12 – Werner RCD/ATD documents, # <u>3</u> Exhibit 13 – Werner Application & Recruiting documents)Member Cases: 8:18–cv–00329–JMG–SMB, 8:18–cv–00462–JMG–SMB(Doty, Grant) (Entered: 11/02/2021)</p>
11/02/2021	197	<p>TEXT ORDER granting <u>195</u> Motion to Restrict. Access to Filing No. 196 shall remain restricted to case participants and the Court. Ordered by Magistrate Judge Susan M. Bazis. (LRH) (Entered: 11/02/2021)</p>

12/01/2021	<u>198</u>	MOTION Restrict Access by Attorney Elizabeth A. Culhane on behalf of Defendants Werner Enterprises, Inc., Drivers Management, LLC, Werner Enterprises, Inc..Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Culhane, Elizabeth) (Entered: 12/01/2021)
12/01/2021	<u>199</u>	OBJECTION to Index,,,,,, (194 in 8:18-cv-00462-JMG-SMB, 215 in 8:18-cv-00329-JMG-SMB) <i>DEFENDANTS' OBJECTIONS AND MOTION TO STRIKE PORTIONS OF FILING NOS. 215-9 AND 194-9</i> by Attorney Elizabeth A. Culhane on behalf of Defendants Werner Enterprises, Inc., Drivers Management, LLC, Werner Enterprises, Inc..Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Culhane, Elizabeth) (Entered: 12/01/2021)
12/01/2021	<u>200</u>	BRIEF in support of OBJECTION to Index,,,,,, (194 in 8:18-cv-00462-JMG-SMB, 215 in 8:18-cv-00329-JMG-SMB) <i>DEFENDANTS' OBJECTIONS AND MOTION TO STRIKE PORTIONS OF FILING NOS. 215-9 AND 194-9</i> (199 in 8:18-cv-00462-JMG-SMB) <i>220 in 8:18-cv-00329-JMG-SMB</i>) by Attorney Elizabeth A. Culhane on behalf of Defendants Werner Enterprises, Inc., Drivers Management, LLC, Werner Enterprises, Inc..Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Culhane, Elizabeth) (Entered: 12/01/2021)
12/01/2021	<u>201</u>	RESTRICTED DOCUMENT <i>INDEX OF EVIDENCE</i> regarding OBJECTION to Index,,,,,, (194 in 8:18-cv-00462-JMG-SMB, 215 in 8:18-cv-00329-JMG-SMB) <i>DEFENDANTS' OBJECTIONS AND MOTION TO STRIKE PORTIONS OF FILING NOS. 215-9 AND 194-9</i> (199 in 8:18-cv-00462-JMG-SMB), MOTION Restrict Access (198 in 8:18-cv-00462-JMG-SMB) ACCESS TO THE PDF DOCUMENT IS RESTRICTED TO CASE PARTICIPANTS AND THE COURT PURSUANT TO THE E-GOVERNMENT ACT AND FEDERAL RULE OF CIVIL PROCEDURE 5.2(a). - by Attorney Elizabeth A. Culhane on behalf of Defendants Werner Enterprises, Inc., Drivers Management, LLC, Werner Enterprises, Inc.. (Attachments: # <u>1</u> Exhibit 1, # <u>2</u> Exhibit 2, # <u>3</u> Exhibit 3, # <u>4</u> Exhibit 4, # <u>5</u> Exhibit 5)Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Culhane, Elizabeth) (Entered: 12/01/2021)
12/01/2021	<u>202</u>	BRIEF in opposition to JOINT MOTION to Compel <i>and for Additional Discovery</i> (192 in 8:18-cv-00462-JMG-SMB) by Attorney Elizabeth A. Culhane on behalf of Defendants Werner Enterprises, Inc., Drivers Management, LLC, Werner Enterprises, Inc..Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Culhane, Elizabeth) (Entered: 12/01/2021)
12/02/2021	203	TEXT ORDER granting <u>198</u> Motion to Restrict. Access to Filing No. 201 is restricted to case participants and the Court. Ordered by Magistrate Judge Susan M. Bazis. (LRH) (Entered: 12/02/2021)
12/15/2021	<u>204</u>	REPLY BRIEF in support of JOINT MOTION to Compel <i>and for Additional Discovery</i> (192 in 8:18-cv-00462-JMG-SMB, 213 in 8:18-cv-00329-JMG-SMB) by Attorney Grant R. Doty on behalf of Intervenor Plaintiff Andrew Deuschle, Plaintiffs Equal Employment Opportunity Commission, Equal Employment Opportunity Commission.Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Doty, Grant) (Entered: 12/15/2021)

12/15/2021	<u>205</u>	RESPONSE regarding OBJECTION to Index,,,,,, (194 in 8:18-cv-00462-JMG-SMB, 215 in 8:18-cv-00329-JMG-SMB) <i>DEFENDANTS' OBJECTIONS AND MOTION TO STRIKE PORTIONS OF FILING NOS. 215-9 AND 194-9</i> (199 in 8:18-cv-00462-JMG-SMB, 220 in 8:18-cv-00329-JMG-SMB) <i>Joint Brief in Opposition to Werner's Motion</i> by Attorney Grant R. Doty on behalf of Intervenor Plaintiff Andrew Deuschle, Plaintiffs Equal Employment Opportunity Commission, Equal Employment Opportunity Commission.Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Doty, Grant) (Entered: 12/15/2021)
12/22/2021	<u>206</u>	REPLY BRIEF in support of OBJECTION to Index,,,,,, (194 in 8:18-cv-00462-JMG-SMB, 215 in 8:18-cv-00329-JMG-SMB) <i>DEFENDANTS' OBJECTIONS AND MOTION TO STRIKE PORTIONS OF FILING NOS. 215-9 AND 194-9</i> (199 in 8:18-cv-00462-JMG-SMB) by Attorney Elizabeth A. Culhane on behalf of Defendants Werner Enterprises, Inc., Drivers Management, LLC, Werner Enterprises, Inc..Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Culhane, Elizabeth) (Entered: 12/22/2021)
04/01/2022	<u>207</u>	ORDER – Plaintiffs' Motion to Compel and for Additional Discovery (Case No. 8:18CV329, Filing No. <u>213</u> ; Case No. 8:18CV462, Filing No. <u>192</u>) is denied. Defendants' Objections and Motion to Strike Potions of the Declaration of Grant Doty (Case No. 8:18CV329, Filing No. 220) ; Case No. 8:18CV462, Filing No. <u>199</u>) is denied as moot. By 12:00 p.m. on April 8, 2022, the parties shall confer and submit proposed revised deposition, summary judgment, and Daubert deadlines to bazis@ned.uscourts.gov. Ordered by Magistrate Judge Susan M. Bazis. (MKR) (Entered: 04/01/2022)
04/27/2022	208	TEXT ORDER – Plaintiffs contacted the Court regarding a discovery dispute on April 7, 2022. The Court instructed the parties to submit position statements regarding the matter, and then later requested supplemental statements. The Court has reviewed the materials submitted in connection with the discovery dispute. Having considered the matter, Plaintiffs will be allowed to depose the following individuals: Ben Pile, Chad Rivedal, Erin Marsh, Donny Gibbs, and Morgan Baker– Maloy. The other depositions requested by Plaintiffs as outlined in the submissions are not allowed. By May 4, 2022, the parties shall confer and submit proposed revised deposition, summary judgment, and Daubert deadlines to bazis@ned.uscourts.gov. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB. Ordered by Magistrate Judge Susan M. Bazis. (LRH) (Entered: 04/27/2022)
04/29/2022	<u>209</u>	NOTICE to Take Deposition of Werner – <i>30(b)(6) on May 18, 2022</i> by Attorney Grant R. Doty on behalf of Plaintiff Equal Employment Opportunity Commission Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Doty, Grant) (Entered: 04/29/2022)
04/29/2022	<u>210</u>	NOTICE to Take Deposition of Scott Hollenbeck <i>on May 18, 2022, at 1 p.m.</i> , by Attorney Grant R. Doty on behalf of Plaintiff Equal Employment Opportunity Commission Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Doty, Grant) (Entered: 04/29/2022)
05/05/2022	<u>211</u>	RESTRICTED VIDEO CONFERENCE INSTRUCTIONS AND ORDER. ACCESS TO THE PDF DOCUMENT IS RESTRICTED TO CASE PARTICIPANTS AND THE COURT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 5.2(e). Ordered by Magistrate Judge Susan M. Bazis. (RMW) (Entered: 05/05/2022)

05/05/2022	<u>212</u>	TRIAL SETTING ORDER – The Pretrial Conference is scheduled to be held before the undersigned magistrate judge on February 23, 2023 at 10:00 a.m. , and will be conducted by video conferencing. Video conference instructions are found at Filing No. <u>211</u> . The jury trial of this case is set to commence before John M. Gerrard, United States District Judge, in Courtroom 1, United States Courthouse, Lincoln, Nebraska, at 9:00 a.m. on March 27, 2023 , or as soon thereafter as the case may be called, for a duration of five (5) trial days. This case is subject to the prior trial of criminal cases and such other civil cases as may be scheduled for trial before this one. Jury selection will be held at the commencement of trial. Ordered by Magistrate Judge Susan M. Bazis. (LKO) (Entered: 05/05/2022)
05/05/2022	<u>213</u>	AMENDED TRIAL SETTING ORDER – The Pretrial Conference is scheduled to be held before the undersigned magistrate judge on February 23, 2023 at 10:00 a.m. , and will be conducted by video conferencing. Video conference instructions are found at Filing No. <u>211</u> . The jury trial of this case is set to commence before John M. Gerrard, United States District Judge, in the <u>Special Proceedings Courtroom, Roman L. Hruska Federal Courthouse, 111 South 18th Plaza, Omaha, Nebraska</u> , at 9:00 a.m. on March 27, 2023 , or as soon thereafter as the case may be called, for a duration of five (5) trial days. This case is subject to the prior trial of criminal cases and such other civil cases as may be scheduled for trial before this one. Jury selection will be held at the commencement of trial. Ordered by Magistrate Judge Susan M. Bazis. (LKO) (Entered: 05/05/2022)
05/05/2022	<u>214</u>	NOTICE to Take Deposition of Ms. Erin Marsh <i>on June 8, 2022, at 9:00 a.m.</i> by Attorney Grant R. Doty on behalf of Plaintiff Equal Employment Opportunity Commission (Doty, Grant) (Entered: 05/05/2022)
06/22/2022	215	TEXT ORDER: A discovery dispute has arisen in this case. A telephone conference to discuss the matter will be held on 6/27/2022 at 03:00 PM before Magistrate Judge Susan M. Bazis. Telephone conference instructions are found at Filing No. <u>28</u> (18cv329) and found at Filing No. <u>15</u> (18cv462). Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB Ordered by Magistrate Judge Susan M. Bazis. (RMW) (Entered: 06/22/2022)
06/27/2022	<u>216</u>	MOTION to Withdraw as Attorney <i>for Plaintiff EEOC</i> by Attorney Grant R. Doty on behalf of Plaintiff Equal Employment Opportunity Commission.(Doty, Grant) (Entered: 06/27/2022)
06/27/2022	217	TEXT MINUTE ENTRY for proceedings held before Magistrate Judge Susan M. Bazis. Telephone Conference held on 6/27/2022. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB (LRH) (Entered: 06/27/2022)
06/27/2022	218	TEXT ORDER – A telephone conference was held regarding a discovery dispute. Upon hearing the matter, it is ordered that Mr. Pile's deposition may be reconvened to allow the EEOC to question him about the two exhibits at issue. The EEOC may not question Mr. Pile about any matter that is not relevant to the issues in this suit. Mr. Pile's responses to questions pertaining to the exhibits may not be used in connection with any other litigation. The parties shall execute a protective order regarding not using Mr. Pile's deposition for any other litigation. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB. Ordered by Magistrate Judge Susan M. Bazis. (LRH) (Entered: 06/27/2022)
06/28/2022	<u>219</u>	

		RESTRICTED AUDIO FILE (3.1 MB) regarding Status Conference <u>237</u> (217 in 8:18-cv-00462-JMG-SMB) held on 6/27/2022 at 3:00 p.m. before Magistrate Judge Susan M. Bazis. ACCESS TO THE PDF DOCUMENT IS RESTRICTED TO CASE PARTICIPANTS AND THE COURT PURSUANT TO THE E-GOVERNMENT ACT AND FEDERAL RULE OF CIVIL PROCEDURE 5.2(e). Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB (KLF) (Entered: 06/28/2022)
06/29/2022	<u>220</u>	TEXT ORDER granting <u>216</u> Motion to Withdraw as Attorney. Grant Doty is hereby terminated as counsel of record. The Clerk of Court shall terminate future notices to him in this case. Ordered by Magistrate Judge Susan M. Bazis. (LRH) (Entered: 06/29/2022)
07/06/2022	<u>221</u>	STIPULATED PROTECTIVE ORDER – Upon the request of the parties, acting pursuant to the Court's June 27, 2022, order (18cv329 Filing No. 238) and (18cv462 Filing No. 218), this Court enters the following Protective Order governing the testimony of Werner Enterprises, Inc. ("Werner") witness, Ben Pile, in either his deposition of June 9, 2022 and/or the reconvened deposition of July 11, 2022. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB Ordered by Magistrate Judge Susan M. Bazis. (LKO) (Entered: 07/06/2022)
07/06/2022	<u>222</u>	NOTICE of Appearance by Attorney Connie W. Gatlin on behalf of Plaintiff Equal Employment Opportunity Commission (Gatlin, Connie) (Entered: 07/06/2022)
07/08/2022	<u>223</u>	NOTICE to Take Deposition of Ben Pile <i>July 11, 2022</i> by Attorney Meredith S. Berwick on behalf of Plaintiff Equal Employment Opportunity Commission Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Berwick, Meredith) (Entered: 07/08/2022)
08/19/2022	<u>224</u>	MOTION to Exclude <i>Expert Testimony</i> by Attorney Elizabeth A. Culhane on behalf of Defendants Werner Enterprises, Inc., Drivers Management, LLC, Werner Enterprises, Inc..Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Culhane, Elizabeth) (Entered: 08/19/2022)
08/19/2022	<u>225</u>	MOTION to Restrict pursuant to the E-Government Act by Attorney Elizabeth A. Culhane on behalf of Defendants Werner Enterprises, Inc., Drivers Management, LLC, Werner Enterprises, Inc..Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Culhane, Elizabeth) (Entered: 08/19/2022)
08/19/2022	<u>226</u>	RESTRICTED DOCUMENT regarding MOTION to Restrict pursuant to the E-Government Act (225 in 8:18-cv-00462-JMG-SMB) ACCESS TO THE PDF DOCUMENT IS RESTRICTED TO CASE PARTICIPANTS AND THE COURT PURSUANT TO THE E-GOVERNMENT ACT AND FEDERAL RULE OF CIVIL PROCEDURE 5.2(a). – by Attorney Elizabeth A. Culhane on behalf of Defendants Werner Enterprises, Inc., Drivers Management, LLC, Werner Enterprises, Inc.. (Attachments: # <u>1</u> Exhibit, # <u>2</u> Exhibit, # <u>3</u> Exhibit, # <u>4</u> Exhibit, # <u>5</u> Exhibit, # <u>6</u> Exhibit, # <u>7</u> Exhibit, # <u>8</u> Exhibit,

		# <u>9</u> Exhibit, # <u>10</u> Exhibit, # <u>11</u> Exhibit)Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Culhane, Elizabeth) (Entered: 08/19/2022)
08/19/2022	<u>227</u>	BRIEF in support of MOTION to Exclude <i>Expert Testimony</i> (224 in 8:18-cv-00462-JMG-SMB) by Attorney Elizabeth A. Culhane on behalf of Defendants Werner Enterprises, Inc., Drivers Management, LLC, Werner Enterprises, Inc..Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Culhane, Elizabeth) (Entered: 08/19/2022)
08/19/2022	228	TEXT ORDER granting <u>225</u> Motion to Restrict pursuant to the E-Government Act. Ordered by Judge John M. Gerrard. (DCD) (Entered: 08/19/2022)
08/19/2022	<u>229</u>	MOTION to Exclude <i>Testimony of William C. Adams</i> by Attorney Meredith S. Berwick on behalf of Plaintiff Equal Employment Opportunity Commission.Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Berwick, Meredith) (Entered: 08/19/2022)
08/19/2022	<u>230</u>	BRIEF in support of <i>Plaintiffs' Motion to Exclude Testimony of William C. Adams</i> by Attorney Meredith S. Berwick on behalf of Plaintiff Equal Employment Opportunity Commission.Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Berwick, Meredith) (Entered: 08/19/2022)
08/19/2022	<u>231</u>	INDEX in support of <i>Plaintiffs' Motion to Exclude Testimony of William C. Adams</i> by Attorney Meredith S. Berwick on behalf of Plaintiff Equal Employment Opportunity Commission. (Attachments: # <u>1</u> Exhibit, # <u>2</u> Exhibit, # <u>3</u> Exhibit)Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Berwick, Meredith) (Entered: 08/19/2022)
09/02/2022	<u>232</u>	BRIEF in opposition to MOTION to Exclude <i>Testimony of William C. Adams</i> <u>229</u> by Attorney Sarah L. McGill on behalf of Defendant Werner Enterprises, Inc..(McGill, Sarah) (Entered: 09/02/2022)
09/02/2022	<u>233</u>	INDEX in opposition to MOTION to Exclude <i>Testimony of William C. Adams</i> <u>229</u> by Attorney Sarah L. McGill on behalf of Defendant Werner Enterprises, Inc..(McGill, Sarah) (Entered: 09/02/2022)
09/02/2022	<u>234</u>	BRIEF in opposition to <i>Defendants' Motion to Exclude Expert Testimony</i> by Attorney Meredith S. Berwick on behalf of Plaintiff Equal Employment Opportunity Commission.Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Berwick, Meredith) (Entered: 09/02/2022)
09/06/2022	<u>235</u>	JOINT MOTION to Extend <i>DEADLINE TO FILE REPLY BRIEFS (ONE-WEEK EXTENSION)</i> by Attorney Sarah L. McGill on behalf of Defendants Werner Enterprises, Inc., Drivers Management, LLC, Werner Enterprises, Inc..Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(McGill, Sarah) (Entered: 09/06/2022)
09/06/2022	236	TEXT ORDER granting <u>235</u> Motion to Extend. Ordered by Judge John M. Gerrard. (DCD) (Entered: 09/06/2022)
09/06/2022	<u>237</u>	NOTICE of Appearance by Attorney Joshua Pierson on behalf of Plaintiffs Equal Employment Opportunity Commission, Equal Employment Opportunity Commission

		Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Pierson, Joshua) (Entered: 09/06/2022)
09/16/2022	<u>238</u>	REPLY BRIEF in support of MOTION to Exclude <i>Testimony of William C. Adams</i> (249 in 8:18-cv-00329-JMG-SMB) by Attorney Joshua Pierson on behalf of Intervenor Plaintiff Andrew Deuschle, Plaintiffs Equal Employment Opportunity Commission, Equal Employment Opportunity Commission.Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Pierson, Joshua) (Entered: 09/16/2022)
09/16/2022	<u>239</u>	REPLY BRIEF in support of MOTION to Exclude <i>Expert Testimony</i> (224 in 8:18-cv-00462-JMG-SMB, 244 in 8:18-cv-00329-JMG-SMB) by Attorney Sarah L. McGill on behalf of Defendants Werner Enterprises, Inc., Werner Enterprises, Inc..Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(McGill, Sarah) (Entered: 09/16/2022)
09/16/2022	<u>240</u>	INDEX in support of Reply Brief, (239 in 8:18-cv-00462-JMG-SMB, 259 in 8:18-cv-00329-JMG-SMB) by Attorney Sarah L. McGill on behalf of Defendants Werner Enterprises, Inc., Werner Enterprises, Inc.. (Attachments: # <u>1</u> Exhibit 13)Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(McGill, Sarah) (Entered: 09/16/2022)
09/22/2022	<u>241</u>	JOINT STIPULATION by Attorney Brian East on behalf of Intervenor Plaintiff Andrew Deuschle.Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(East, Brian) (Entered: 09/22/2022)
09/22/2022	242	TEXT ORDER approving (261) Stipulation in case 8:18-cv-00329-JMG-SMB. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB. Ordered by Judge John M. Gerrard. (DCD) (Entered: 09/22/2022)
09/23/2022	<u>243</u>	MOTION for Summary Judgment by Attorney Elizabeth A. Culhane on behalf of Defendant Werner Enterprises, Inc..(Culhane, Elizabeth) (Entered: 09/23/2022)
09/23/2022	<u>244</u>	BRIEF in support of MOTION for Summary Judgment <u>243</u> by Attorney Elizabeth A. Culhane on behalf of Defendant Werner Enterprises, Inc..(Culhane, Elizabeth) (Entered: 09/23/2022)
09/23/2022	<u>245</u>	MOTION to Restrict pursuant to the E-Government Act by Attorney Elizabeth A. Culhane on behalf of Defendant Werner Enterprises, Inc..(Culhane, Elizabeth) (Entered: 09/23/2022)
09/23/2022	<u>246</u>	RESTRICTED DOCUMENT <i>Defendants' Index of Evidence in Support of Defendants' Motion for Summary Judgment</i> regarding MOTION to Restrict pursuant to the E-Government Act <u>245</u> ACCESS TO THE PDF DOCUMENT IS RESTRICTED TO CASE PARTICIPANTS AND THE COURT PURSUANT TO THE E-GOVERNMENT ACT AND FEDERAL RULE OF CIVIL PROCEDURE 5.2(a). - by Attorney Elizabeth A. Culhane on behalf of Defendant Werner Enterprises, Inc.. (Attachments: # <u>1</u> Exhibit 1, # <u>2</u> Exhibit 2, # <u>3</u> Exhibit 3, # <u>4</u> Exhibit 4, # <u>5</u> Exhibit 5, # <u>6</u> Exhibit 6, # <u>7</u> Exhibit 7,

		<p># <u>8</u> Exhibit 8, # <u>9</u> Exhibit 9, # <u>10</u> Exhibit 10, # <u>11</u> Exhibit 11, # <u>12</u> Exhibit 12, # <u>13</u> Exhibit 13, # <u>14</u> Exhibit 14)(Culhane, Elizabeth) (Entered: 09/23/2022)</p>
09/23/2022	247	TEXT ORDER granting (265) Motion to Restrict pursuant to the E-Government Act in case 8:18-cv-00329-JMG-SMB. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB. Ordered by Judge John M. Gerrard. (DCD) (Entered: 09/23/2022)
09/23/2022	<u>248</u>	MOTION for Summary Judgment by Attorney Meredith S. Berwick on behalf of Plaintiff Equal Employment Opportunity Commission.(Berwick, Meredith) (Entered: 09/23/2022)
09/23/2022	<u>249</u>	BRIEF in support of <i>Plaintiff's Motion for Summary Judgment</i> by Attorney Meredith S. Berwick on behalf of Plaintiff Equal Employment Opportunity Commission.(Berwick, Meredith) (Entered: 09/23/2022)
09/23/2022	<u>250</u>	INDEX in support of <i>Plaintiff's Motion for Summary Judgment</i> by Attorney Meredith S. Berwick on behalf of Plaintiff Equal Employment Opportunity Commission. (Attachments: # <u>1</u> Exhibit, # <u>2</u> Exhibit, # <u>3</u> Exhibit, # <u>4</u> Exhibit, # <u>5</u> Exhibit, # <u>6</u> Exhibit, # <u>7</u> Exhibit, # <u>8</u> Exhibit, # <u>9</u> Exhibit, # <u>10</u> Exhibit, # <u>11</u> Exhibit, # <u>12</u> Exhibit, # <u>13</u> Exhibit, # <u>14</u> Exhibit, # <u>15</u> Exhibit, # <u>16</u> Exhibit, # <u>17</u> Exhibit, # <u>18</u> Exhibit, # <u>19</u> Exhibit, # <u>20</u> Exhibit, # <u>21</u> Exhibit, # <u>22</u> Exhibit, # <u>23</u> Exhibit, # <u>24</u> Exhibit, # <u>25</u> Exhibit, # <u>26</u> Exhibit)(Berwick, Meredith) (Entered: 09/23/2022)
10/14/2022	<u>251</u>	BRIEF in opposition to MOTION for Summary Judgment (248 in 8:18-cv-00462-JMG-SMB) by Attorney Elizabeth A. Culhane on behalf of

		Defendant Werner Enterprises, Inc..Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Culhane, Elizabeth) (Entered: 10/14/2022)
10/14/2022	<u>252</u>	BRIEF in opposition to MOTION for Summary Judgment <u>248</u> by Attorney Elizabeth A. Culhane on behalf of Defendant Drivers Management, LLC.(Culhane, Elizabeth) (Entered: 10/14/2022)
10/14/2022	<u>253</u>	INDEX in opposition to MOTION for Summary Judgment <u>248</u> by Attorney Elizabeth A. Culhane on behalf of Defendant Drivers Management, LLC.(Culhane, Elizabeth) (Entered: 10/14/2022)
10/14/2022	<u>254</u>	BRIEF in opposition to <i>Defendants' Motion for Summary Judgment</i> by Attorney Meredith S. Berwick on behalf of Plaintiff Equal Employment Opportunity Commission.Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Berwick, Meredith) (Entered: 10/14/2022)
10/14/2022	<u>255</u>	INDEX in opposition to <i>Defendants' Motion for Summary Judgment</i> by Attorney Meredith S. Berwick on behalf of Plaintiff Equal Employment Opportunity Commission. (Attachments: # <u>1</u> Exhibit Ex. 1, # <u>2</u> Exhibit Ex. 2, # <u>3</u> Exhibit Ex. 3, # <u>4</u> Exhibit Ex. 4, # <u>5</u> Exhibit Ex. 5, # <u>6</u> Exhibit Ex. 6, # <u>7</u> Exhibit Ex. 7, # <u>8</u> Exhibit Ex. 9, # <u>9</u> Exhibit Ex. 10, # <u>10</u> Exhibit Ex. 11, # <u>11</u> Exhibit Ex. 12, # <u>12</u> Exhibit Ex. 13, # <u>13</u> Exhibit Ex. 14, # <u>14</u> Exhibit Ex. 15, # <u>15</u> Exhibit Ex. 16, # <u>16</u> Exhibit Ex. 17, # <u>17</u> Exhibit Ex. 18, # <u>18</u> Exhibit Ex. 19, # <u>19</u> Exhibit Ex. 20, # <u>20</u> Exhibit Ex. 21, # <u>21</u> Exhibit Ex. 22, # <u>22</u> Exhibit Ex. 23, # <u>23</u> Exhibit Ex. 24, # <u>24</u> Exhibit Ex. 25, # <u>25</u> Exhibit Ex. 26, # <u>26</u> Exhibit Ex. 27, # <u>27</u> Exhibit Ex. 28, # <u>28</u> Exhibit Ex. 29, # <u>29</u> Exhibit Ex. 30, # <u>30</u> Exhibit Ex. 31, # <u>31</u> Exhibit Ex. 32, # <u>32</u> Exhibit Ex. 33)Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Berwick, Meredith) (Entered: 10/14/2022)

10/14/2022	<u>256</u>	MOTION to Restrict pursuant to the E-Government Act by Attorney Meredith S. Berwick on behalf of Plaintiff Equal Employment Opportunity Commission. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Berwick, Meredith) (Entered: 10/14/2022)
10/14/2022	<u>257</u>	RESTRICTED DOCUMENT <i>Index of Confidential Evidence in Support of Plaintiffs' Opposition to Defendants' Motion for Summary Judgment</i> regarding MOTION to Restrict pursuant to the E-Government Act (256 in 8:18-cv-00462-JMG-SMB) ACCESS TO THE PDF DOCUMENT IS RESTRICTED TO CASE PARTICIPANTS AND THE COURT PURSUANT TO THE E-GOVERNMENT ACT AND FEDERAL RULE OF CIVIL PROCEDURE 5.2(a). – by Attorney Meredith S. Berwick on behalf of Plaintiff Equal Employment Opportunity Commission. (Attachments: # <u>1</u> Exhibit Ex. 8) Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Berwick, Meredith) (Entered: 10/14/2022)
10/15/2022	258	TEXT ORDER granting (278) Motion to Restrict pursuant to the E-Government Act in case 8:18-cv-00329-JMG-SMB. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB. Ordered by Judge John M. Gerrard. (DCD) (Entered: 10/15/2022)
10/21/2022	<u>259</u>	REPLY BRIEF in support of MOTION for Summary Judgment <u>243</u> by Attorney Elizabeth A. Culhane on behalf of Defendants Drivers Management, LLC, Werner Enterprises, Inc..(Culhane, Elizabeth) (Entered: 10/21/2022)
10/21/2022	<u>260</u>	REPLY BRIEF in support of <i>Plaintiff's Motion for Summary Judgment</i> by Attorney Meredith S. Berwick on behalf of Plaintiff Equal Employment Opportunity Commission.(Berwick, Meredith) (Entered: 10/21/2022)
10/21/2022	<u>261</u>	INDEX in support of <i>Plaintiff's Reply Brief in Support of Motion for Summary Judgment</i> by Attorney Meredith S. Berwick on behalf of Plaintiff Equal Employment Opportunity Commission. (Attachments: # <u>1</u> Exhibit, # <u>2</u> Exhibit, # <u>3</u> Exhibit)(Berwick, Meredith) (Entered: 10/21/2022)
10/22/2022	262	TEXT ORDER granting (284) Motion to Restrict pursuant to the E-Government Act in case 8:18-cv-00329-JMG-SMB. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB. Ordered by Judge John M. Gerrard. (DCD) (Entered: 10/22/2022)
01/27/2023	<u>263</u>	SECOND AMENDED TRIAL SETTING ORDER – The Pretrial Conference <u>is rescheduled</u> to be held before the undersigned magistrate judge on August 7, 2023 at 10:00 a.m. , and will be conducted by video conferencing. Video conference instructions are found at Filing No. <u>211</u> . The jury trial of this case <u>is rescheduled</u> to commence before John M. Gerrard, United States District Judge, in the Special Proceedings Courtroom, Roman L. Hruska Federal Courthouse, 111 South 18th Plaza, Omaha, Nebraska, at 9:00 a.m. on August 28, 2023 , or as soon thereafter as the case may be called, for a duration of five (5) trial days. This case is subject to the prior trial of criminal cases and such other civil cases as may be scheduled for trial before this one. Jury selection will be held at the commencement of trial. Ordered by Magistrate Judge Susan M. Bazis. (LKO) (Entered: 01/27/2023)
03/27/2023	<u>264</u>	MOTION for Leave <i>TO SUBMIT NEW AUTHORITY IN OPPOSITION TO PLAINTIFFS' MOTIONS FOR PARTIAL SUMMARY JUDGMENT</i> by Attorney

		Elizabeth A. Culhane on behalf of Defendants Werner Enterprises, Inc., Drivers Management, LLC, Werner Enterprises, Inc.. (Attachments: # <u>1</u> Exhibit 1)Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Culhane, Elizabeth) (Entered: 03/27/2023)
03/31/2023	<u>265</u>	MEMORANDUM AND ORDER denying (244) Motion to Exclude; denying (249) Motion to Exclude; granting in part and denying in part (263) Motion for Summary Judgment; granting in part and denying in part (268) Motion for Partial Summary Judgment.; granting (291) Motion for Leave in case 8:18-cv-00329-JMG-SMB. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB Ordered by Senior Judge John M. Gerrard. (DCD) Modified on 3/31/2023 (DCD). (Entered: 03/31/2023)
03/31/2023	<u>266</u>	ORDER denying <u>224</u> Motion to Exclude; denying <u>229</u> Motion to Exclude; granting in part and denying in part <u>243</u> Motion for Summary Judgment; granting in part and denying in part <u>248</u> Motion for Summary Judgment; granting <u>264</u> Motion for Leave. Ordered by Senior Judge John M. Gerrard. (DCD) (Entered: 03/31/2023)
04/06/2023	<u>267</u>	NOTICE of Appearance by Attorney Lauren M. Wilson on behalf of Plaintiff Equal Employment Opportunity Commission (Wilson, Lauren) (Entered: 04/06/2023)
04/18/2023	<u>268</u>	MOTION for Reconsideration of <i>the Court's Order Denying Summary Judgment on Count III in EEOC 1 or, in the Alternative, for Clarification and Request for Expedited Briefing Schedule</i> by Attorney Elizabeth A. Culhane on behalf of Defendants Werner Enterprises, Inc., Drivers Management, LLC, Werner Enterprises, Inc..Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Culhane, Elizabeth) (Entered: 04/18/2023)
04/18/2023	<u>269</u>	BRIEF in support of MOTION for Reconsideration of <i>the Court's Order Denying Summary Judgment on Count III in EEOC 1 or, in the Alternative, for Clarification and Request for Expedited Briefing Schedule</i> (268 in 8:18-cv-00462-JMG-SMB, 294 in 8:18-cv-00329-JMG-SMB) by Attorney Elizabeth A. Culhane on behalf of Defendants Werner Enterprises, Inc., Drivers Management, LLC, Werner Enterprises, Inc..Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Culhane, Elizabeth) (Entered: 04/18/2023)
04/19/2023	270	TEXT ORDER regarding MOTION for Reconsideration of <i>the Court's Order Denying Summary Judgment on Count III in EEOC 1 or, in the Alternative, for Clarification and Request for Expedited Briefing Schedule</i> (268 in 8:18-cv-00462-JMG-SMB, 294 in 8:18-cv-00329-JMG-SMB) filed by Drivers Management, LLC, Werner Enterprises, Inc.: IT IS ORDERED that the defendants' request for expedited briefing is denied. The plaintiff may respond to the defendants' motion on or before May 2, 2023. The defendants may reply in support of their motion on or before May 9, 2023. Ordered by Senior District Judge John M. Gerrard. (DCD) (Entered: 04/19/2023)
05/02/2023	<u>271</u>	BRIEF in opposition to <i>Defendants' Motion for Reconsideration</i> by Attorney Meredith S. Berwick on behalf of Plaintiff Equal Employment Opportunity Commission.Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Berwick, Meredith) (Entered: 05/02/2023)
05/09/2023	<u>272</u>	BRIEF in support of MOTION for Reconsideration of <i>the Court's Order Denying Summary Judgment on Count III in EEOC 1 or, in the Alternative, for Clarification and Request for Expedited Briefing Schedule</i> (268 in 8:18-cv-00462-JMG-SMB, 294 in 8:18-cv-00329-JMG-SMB) by Attorney Elizabeth A. Culhane on behalf of

		Defendants Werner Enterprises, Inc., Drivers Management, LLC, Werner Enterprises, Inc..Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Culhane, Elizabeth) (Entered: 05/09/2023)
05/26/2023	<u>273</u>	BRIEF <i>Plaintiff's Trial</i> by Attorney Joshua Pierson on behalf of Intervenor Plaintiff Andrew Deuschle, Plaintiff Equal Employment Opportunity Commission.Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Pierson, Joshua) (Entered: 05/26/2023)
05/26/2023	<u>274</u>	PROPOSED JURY INSTRUCTIONS by Attorney Joshua Pierson on behalf of Intervenor Plaintiff Andrew Deuschle, Plaintiff Equal Employment Opportunity Commission.. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Pierson, Joshua) (Entered: 05/26/2023)
05/26/2023	<u>275</u>	PROPOSED VERDICT FORM by Attorney Joshua Pierson on behalf of Intervenor Plaintiff Andrew Deuschle, Plaintiff Equal Employment Opportunity Commission. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Pierson, Joshua) (Entered: 05/26/2023)
05/31/2023	<u>276</u>	MEMORANDUM AND ORDER– Werner's motion to reconsider (filing <u>294</u>) is denied. Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB Ordered by Senior Judge John M. Gerrard. (MKR) (Entered: 05/31/2023)
06/02/2023	<u>277</u>	OBJECTION to Proposed Jury Instructions(274 in 8:18-cv-00462-JMG-SMB), Proposed Verdict Form(275 in 8:18-cv-00462-JMG-SMB) by Attorney Elizabeth A. Culhane on behalf of Defendants Werner Enterprises, Inc., Werner Enterprises, Inc..Member Cases: 8:18-cv-00329-JMG-SMB, 8:18-cv-00462-JMG-SMB(Culhane, Elizabeth) (Entered: 06/02/2023)
07/31/2023	<u>278</u>	MOTION in Limine by Attorney Elizabeth A. Culhane on behalf of Defendants Drivers Management, LLC, Werner Enterprises, Inc..(Culhane, Elizabeth) (Entered: 07/31/2023)
07/31/2023	<u>279</u>	BRIEF in support of MOTION in Limine <u>278</u> by Attorney Elizabeth A. Culhane on behalf of Defendants Drivers Management, LLC, Werner Enterprises, Inc..(Culhane, Elizabeth) (Entered: 07/31/2023)
07/31/2023	<u>280</u>	MOTION to Restrict pursuant to the E-Government Act by Attorney Elizabeth A. Culhane on behalf of Defendants Drivers Management, LLC, Werner Enterprises, Inc..(Culhane, Elizabeth) (Entered: 07/31/2023)
07/31/2023	<u>281</u>	RESTRICTED DOCUMENT <i>Index of Evidence in Support of Defendants' Motions in Limine</i> regarding MOTION in Limine <u>278</u> ACCESS TO THE PDF DOCUMENT IS RESTRICTED TO CASE PARTICIPANTS AND THE COURT PURSUANT TO THE E-GOVERNMENT ACT AND FEDERAL RULE OF CIVIL PROCEDURE 5.2(a). – by Attorney Elizabeth A. Culhane on behalf of Defendants Drivers Management, LLC, Werner Enterprises, Inc.. (Attachments: # <u>1</u> Exhibit Declaration of Sarah L. (Sally) McGill, # <u>2</u> Exhibit Portions of Transcript of Deposition of Erin Marsh, # <u>3</u> Exhibit Portions of Plaintiff's Fourth Supplemental/Amended Rule 26(a) Initial Disclosures)(Culhane, Elizabeth) (Entered: 07/31/2023)
07/31/2023	<u>282</u>	MOTION in Limine <i>Plaintiff's Combined Motions in Limine</i> by Attorney Meredith S. Berwick on behalf of Plaintiff Equal Employment Opportunity Commission.(Berwick, Meredith) (Entered: 07/31/2023)

07/31/2023	<u>283</u>	BRIEF in support of <i>Plaintiff's Combined Motions in Limine</i> by Attorney Meredith S. Berwick on behalf of Plaintiff Equal Employment Opportunity Commission.(Berwick, Meredith) (Entered: 07/31/2023)
07/31/2023	<u>284</u>	INDEX in support of <i>Plaintiff's Combined Motions in Limine</i> by Attorney Meredith S. Berwick on behalf of Plaintiff Equal Employment Opportunity Commission. (Attachments: # <u>1</u> Exhibit, # <u>2</u> Exhibit, # <u>3</u> Exhibit, # <u>4</u> Exhibit)(Berwick, Meredith) (Entered: 07/31/2023)
08/01/2023	285	TEXT ORDER granting <u>280</u> Motion to Restrict pursuant to the E-Government Act. Ordered by Senior Judge John M. Gerrard. (DCD) (Entered: 08/01/2023)
08/07/2023	<u>286</u>	ORDER ON FINAL PRETRIAL CONFERENCE – Trial is set for August 28, 2023 September 1, 2023. Counsel estimate the length of trial will consume not less than 3 days, not more than 5 days, and probably about 4 days. Ordered by Magistrate Judge Susan M. Bazis. (LKO) (Entered: 08/07/2023)
08/14/2023	<u>287</u>	BRIEF in opposition to MOTION in Limine <i>Plaintiff's Combined Motions in Limine</i> <u>282</u> by Attorney Elizabeth A. Culhane on behalf of Defendants Drivers Management, LLC, Werner Enterprises, Inc..(Culhane, Elizabeth) (Entered: 08/14/2023)
08/14/2023	<u>288</u>	INDEX in opposition to MOTION in Limine <i>Plaintiff's Combined Motions in Limine</i> <u>282</u> by Attorney Elizabeth A. Culhane on behalf of Defendants Drivers Management, LLC, Werner Enterprises, Inc.. (Attachments: # <u>1</u> Exhibit Declaration of Elizabeth A. Culhane)(Culhane, Elizabeth) (Entered: 08/14/2023)
08/14/2023	<u>289</u>	BRIEF in opposition to <i>Defendants' Motions in Limine</i> by Attorney Meredith S. Berwick on behalf of Plaintiff Equal Employment Opportunity Commission.(Berwick, Meredith) (Entered: 08/14/2023)
08/14/2023	<u>290</u>	SUPPLEMENTAL MOTION in Limine by Attorney Meredith S. Berwick on behalf of Plaintiff Equal Employment Opportunity Commission.(Berwick, Meredith) (Entered: 08/14/2023)
08/14/2023	<u>291</u>	BRIEF in support of <i>Plaintiff's Supplemental Motion in Limine</i> by Attorney Meredith S. Berwick on behalf of Plaintiff Equal Employment Opportunity Commission.(Berwick, Meredith) (Entered: 08/14/2023)
08/17/2023	<u>292</u>	TRIAL ORDER – The above-captioned civil case is set for a jury trial before the undersigned judge in Courtroom 1 (Special Proceedings), Roman L. Hruska Federal Courthouse, 111 South 18th Plaza, Omaha, Nebraska, commencing at 9:00 a.m. on Monday, August 28, 2023 , or as soon thereafter as the case may be called, for a duration of 3 to 5 trial days. A final pretrial conference is scheduled to be held before the undersigned judge in chambers at 8:20 a.m. on Monday, August 28, 2023 . To facilitate the pretrial conference, the Court will utilize the Pretrial Conference Order entered by the United States Magistrate Judge on August 7, 2023.Ordered by Senior Judge John M. Gerrard. (NMW) (Entered: 08/17/2023)
08/21/2023	<u>293</u>	REPLY BRIEF in support of MOTION in Limine <u>278</u> by Attorney Elizabeth A. Culhane on behalf of Defendants Drivers Management, LLC, Werner Enterprises, Inc..(Culhane, Elizabeth) (Entered: 08/21/2023)

08/21/2023	<u>294</u>	INDEX in support of MOTION in Limine <u>278</u> (<i>Supplemental Index of Evidence</i>) by Attorney Elizabeth A. Culhane on behalf of Defendants Drivers Management, LLC, Werner Enterprises, Inc.. (Attachments: # <u>1</u> Exhibit Portions of Deposition of Erin Marsh, taken 6-8-22, # <u>2</u> Exhibit Portions of Filing 250 in Case No. 18-cv-329, Trial Transcript Vol. III, # <u>3</u> Exhibit Portions of Filing 351 in Case No. 18-cv-329, Trial Transcript Volume IV)(Culhane, Elizabeth) (Entered: 08/21/2023)
08/21/2023	<u>295</u>	PROPOSED JURY INSTRUCTIONS (<i>Defendants'</i>) by Attorney Elizabeth A. Culhane on behalf of Defendants Drivers Management, LLC, Werner Enterprises, Inc... (Culhane, Elizabeth) (Entered: 08/21/2023)
08/21/2023	<u>296</u>	PROPOSED VERDICT FORM (<i>Defendants'</i>) by Attorney Elizabeth A. Culhane on behalf of Defendants Drivers Management, LLC, Werner Enterprises, Inc.. (Culhane, Elizabeth) (Entered: 08/21/2023)
08/21/2023	<u>297</u>	BRIEF (<i>Trial</i>) by Attorney Elizabeth A. Culhane on behalf of Defendants Drivers Management, LLC, Werner Enterprises, Inc..(Culhane, Elizabeth) (Entered: 08/21/2023)
08/21/2023	<u>298</u>	BRIEF <i>Trial</i> by Attorney Joshua Pierson on behalf of Plaintiff Equal Employment Opportunity Commission.(Pierson, Joshua) (Entered: 08/21/2023)
08/21/2023	<u>299</u>	PROPOSED JURY INSTRUCTIONS by Attorney Joshua Pierson on behalf of Plaintiff Equal Employment Opportunity Commission.. (Pierson, Joshua) (Entered: 08/21/2023)
08/21/2023	<u>300</u>	PROPOSED VERDICT FORM by Attorney Joshua Pierson on behalf of Plaintiff Equal Employment Opportunity Commission. (Pierson, Joshua) (Entered: 08/21/2023)
08/21/2023	<u>301</u>	REPLY BRIEF in support of <i>Plaintiff's Motions in Limine</i> by Attorney Joshua Pierson on behalf of Plaintiff Equal Employment Opportunity Commission.(Pierson, Joshua) (Entered: 08/21/2023)
08/22/2023	<u>302</u>	NOTICE of Jury Pool Trial Report and Supplemental Questionnaires. Counsel should refrain from reproducing and/or distributing these documents. Counsel is required to permanently delete electronic copies and destroy paper copies of the supplemental questionnaires after voir dire. ACCESS TO THE PDF DOCUMENT IS RESTRICTED TO CASE PARTICIPANTS AND THE COURT PURSUANT TO THE E-GOVERNMENT ACT AND FEDERAL RULE OF CIVIL PROCEDURE 5.2(a). (BMH) (Entered: 08/22/2023)
08/23/2023	<u>303</u>	MEMORANDUM AND ORDER – The plaintiffs' motion in limine (filing <u>282</u>) is granted in part and denied in part. The plaintiffs' supplemental motion in limine (filing <u>290</u>) is granted. The defendants' motion in limine (filing <u>278</u>) is granted in part and denied in part. Ordered by Senior Judge John M. Gerrard. (NMW) (Entered: 08/23/2023)
08/25/2023	<u>304</u>	OBJECTION to Proposed Jury Instructions <u>299</u> , Proposed Verdict Form <u>300</u> by Attorney Elizabeth A. Culhane on behalf of Defendants Drivers Management, LLC, Werner Enterprises, Inc..(Culhane, Elizabeth) (Entered: 08/25/2023)
08/27/2023	<u>305</u>	ORDER on Deposition Designations. Ordered by Senior Judge John M. Gerrard. (DCD) (Entered: 08/27/2023)

08/28/2023	<u>306</u>	RETURN of service on 08/22/2023 upon Christopher Hilkemann by Attorney Sarah L. McGill on behalf of Defendants Drivers Management, LLC, Werner Enterprises, Inc..(McGill, Sarah) (Entered: 08/28/2023)
08/28/2023	<u>307</u>	BRIEF in opposition to <i>Plaintiff's Supplemental Motion in Limine</i> by Attorney Elizabeth A. Culhane on behalf of Defendants Drivers Management, LLC, Werner Enterprises, Inc..(Culhane, Elizabeth) (Entered: 08/28/2023)
08/28/2023	<u>308</u>	INDEX in opposition to <i>Plaintiff's Supplemental Motion in Limine</i> by Attorney Elizabeth A. Culhane on behalf of Defendants Drivers Management, LLC, Werner Enterprises, Inc.. (Attachments: # <u>1</u> Exhibit Declaration of Elizabeth A. Culhane)(Culhane, Elizabeth) (Entered: 08/28/2023)
08/28/2023	309	TEXT MINUTE ENTRY for jury trial proceedings held before Senior Judge John M. Gerrard in Omaha on 8/28/2023. Conference held in chambers. Court grants parties' reciprocal motion to sequester witnesses. Jury selected. Opening statements by parties. Evidence by plaintiff. Trial not concluded, jury trial continued to 8/29/2023 at 08:45 AM in Courtroom 1, Roman L. Hruska Federal Courthouse, 111 South 18th Plaza, Omaha, NE before Senior Judge John M. Gerrard. Appearance for Plaintiff: Meredith S. Berwick, Joshua Pierson, Lauren M. Wilson; for Defendants: Patrick J. Barrett, Elizabeth A. Culhane; Courtroom Deputy: Kathy Miller; Court Reporter: Lisa Grimminger. Sign Language Interpreters: Patricia McCutcheon, CSC, SC:L, and Elaine Hernandez, CI, CT, NIC-A, SC:L. Time Start: 9:21 AM; Time Stop: 4:32 PM; Time in Court: 5 Hours 55 Minutes. (KMM) (Entered: 08/28/2023)
08/28/2023	<u>310</u>	JURY PANEL RECORD. ACCESS TO THE PDF DOCUMENT IS RESTRICTED TO CASE PARTICIPANTS AND THE COURT PURSUANT TO THE E-GOVERNMENT ACT AND FEDERAL RULE OF CIVIL PROCEDURE 5.2(a). (KMM) (Entered: 08/28/2023)
08/28/2023	<u>311</u>	Preliminary Jury Instructions. (KMM) (Entered: 08/28/2023)
08/29/2023	312	TEXT MINUTE ENTRY for jury trial proceedings held before Senior Judge John M. Gerrard in Omaha on 8/29/2023. Evidence by plaintiff. Trial not concluded, continued to 8/30/2023 at 08:45 AM in Courtroom 1, Roman L. Hruska Federal Courthouse, 111 South 18th Plaza, Omaha, NE before Senior Judge John M. Gerrard. Appearance for Plaintiff: Meredith S. Berwick, Joshua Pierson, Lauren M. Wilson; for Defendants: Patrick J. Barrett, Elizabeth A. Culhane; Courtroom Deputy: Kathy Miller; Court Reporter: Lisa Grimminger. Sign Language Interpreters: Patricia McCutcheon, CSC, SC:L, and Elaine Hernandez, CI, CT, NIC-A, SC:L. Time Start: 8:45 AM; Time Stop: 4:45 PM; Time in Court: 6 Hours 24 Minutes. (KMM) (Entered: 08/29/2023)
08/30/2023	<u>313</u>	BRIEF in support of <i>Plaintiff's Motion for Judgment as a Matter of Law</i> by Attorney Meredith S. Berwick on behalf of Plaintiff Equal Employment Opportunity Commission.(Berwick, Meredith) (Entered: 08/30/2023)
08/30/2023	314	TEXT MINUTE ENTRY for jury trial proceedings held before Senior Judge John M. Gerrard in Omaha on 8/30/2023. Evidence by plaintiff. Plaintiff rests. Court overrules defendants' Rule 50(a) motion for judgment as a matter of law. Plaintiff's motion for partial directed verdict is taken under advisement. Evidence by defendants. Trial not concluded, continued to 8/31/2023 at 08:45 AM in Courtroom 1, Roman L. Hruska Federal Courthouse, 111 South 18th Plaza, Omaha, NE before Senior Judge John M. Gerrard. Appearance for Plaintiff: Meredith S. Berwick, Joshua Pierson, Lauren M.

		Wilson; for Defendants: Patrick J. Barrett, Elizabeth A. Culhane; Courtroom Deputy: Kathy Miller; Court Reporter: Lisa Grimminger. Sign Language Interpreters: Patricia McCutcheon, CSC, SC:L, and Elaine Hernandez, CI, CT, NIC-A, SC:L. Time Start: 8:30 AM; Time Stop: 4:10 PM; Time in Court: 5 Hours 57 Minutes. (KMM) (Entered: 08/30/2023)
08/31/2023	<u>315</u>	BRIEF in opposition to <i>Plaintiff's Partial Motion for Judgment as a Matter of Law</i> by Attorney Elizabeth A. Culhane on behalf of Defendants Drivers Management, LLC, Werner Enterprises, Inc..(Culhane, Elizabeth) (Entered: 08/31/2023)
08/31/2023	<u>316</u>	ORDER granting plaintiff's motion for partial directed verdict. Ordered by Senior Judge John M. Gerrard. (DCD) (Entered: 08/31/2023)
08/31/2023	317	TEXT MINUTE ENTRY for jury trial proceedings held before Senior Judge John M. Gerrard in Omaha on 8/31/2023. Evidence by defendants. Defendants rest. Rebuttal evidence by plaintiff. Plaintiff rests. Court rules on the parties' motions as ordered in Court. Informal jury instruction conference held in chambers. Trial not concluded, continued to 9/01/2023 at 08:45 AM in Courtroom 1, Roman L. Hruska Federal Courthouse, 111 South 18th Plaza, Omaha, NE before Senior Judge John M. Gerrard. Appearance for Plaintiff: Meredith S. Berwick, Joshua Pierson, Lauren M. Wilson; for Defendants: Patrick J. Barrett, Elizabeth A. Culhane; Courtroom Deputy: Kathy Miller; Court Reporter: Lisa Grimminger. Sign Language Interpreters: Patricia McCutcheon, CSC, SC:L, and Elaine Hernandez, CI, CT, NIC-A, SC:L. Time Start: 8:45 AM; Time Stop: 5:30 PM; Time in Court: 5 Hours 30 Minutes. (KMM) (Entered: 08/31/2023)
09/01/2023	318	TEXT MINUTE ENTRY for jury trial proceedings held before Senior Judge John M. Gerrard in Omaha on 9/01/2023. Formal jury instruction conference held. Final jury instructions read to jury. Closing arguments made. Case submitted to jury at 10:56 a.m. Jury returned at 12:45 p.m. with a verdict in favor of the Plaintiff. Clerk directed to file verdict. Jury excused. The Court set a bench trial for the remaining issues of back pay and equitable relief to commence at 9:00 a.m. on October 3, 2023, in Courtroom 1, Roman L. Hruska Federal Courthouse, 111 South 18th Plaza, Omaha, NE, for 2 days. Appearance for Plaintiff: Meredith S. Berwick, Joshua Pierson, Lauren M. Wilson; for Defendants: Patrick J. Barrett, Elizabeth A. Culhane; Courtroom Deputy: Kathy Miller; Court Reporter: Lisa Grimminger. Sign Language Interpreters: Patricia McCutcheon, CSC, SC:L, and Elaine Hernandez, CI, CT, NIC-A, SC:L. Time Start: 8:22 AM; Time Stop: 12:57 PM; Time in Court: 2 Hours 19 Minutes. (KMM) (Entered: 09/01/2023)
09/01/2023	319	TEXT NOTICE of Hearing per entry 318. Non-Jury Trial set for 10/3/2023 at 09:00 AM in Courtroom 1, Roman L. Hruska Federal Courthouse, 111 South 18th Plaza, Omaha, NE before Senior Judge John M. Gerrard. (KMM) (Entered: 09/01/2023)
09/01/2023	<u>320</u>	WITNESS LIST from Jury Trial held August 28 – September 1, 2023. (KMM) (Entered: 09/01/2023)
09/01/2023	<u>321</u>	EXHIBIT LIST from Jury Trial held August 28 – September 1, 2023. (KMM) (Entered: 09/01/2023)
09/01/2023	<u>322</u>	Final Jury Instructions. (KMM) (Entered: 09/01/2023)
09/01/2023	<u>323</u>	JURY VERDICT with foreperson's signature redacted pursuant to the E-Government Act in the favor of the Plaintiff in the sum of \$75,000 for actual damages and

		\$36,000,000 for punitive damages. Attorneys for Plaintiff: Meredith S. Berwick, Joshua Pierson, Lauren M. Wilson; for Defendants: Patrick J. Barrett, Elizabeth A. Culhane – PART 1 OF 2. (KMM) Modified on 9/1/2023 to clarify entry (KMM). (Entered: 09/01/2023)
09/01/2023	<u>324</u>	PART 2 OF 2 – FOREPERSON'S SIGNATURE Page regarding Jury Verdict <u>323</u> . ACCESS TO THE PDF DOCUMENT IS RESTRICTED TO CASE PARTICIPANTS AND THE COURT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 5.2(e). (KMM) (Entered: 09/01/2023)
09/14/2023	325	TEXT ORDER: Bench trial on the remaining issues of back pay and equitable relief is continued to <u>October 4, 2023 at 9:00 AM</u> in Courtroom 1 (Special Proceedings), Roman L. Hruska Federal Courthouse, 111 South 18th Plz, Omaha, NE before Senior Judge John M. Gerrard. On or before <u>September 26, 2023</u> , the parties shall file pre-hearing briefs outlining their anticipated evidence and arguments for the October 4 proceeding. Ordered by Senior Judge John M. Gerrard. (DCD) (Entered: 09/14/2023)
09/18/2023	326	TEXT ORDER changing <u>location</u> of trial: Bench trial on the remaining issues of back pay and equitable relief is set for October 4, 2023 at 9:00 AM in <u>Courtroom 2</u> , Roman L. Hruska Federal Courthouse, 111 South 18th Plaza, Omaha, NE before Senior Judge John M. Gerrard. Ordered by Senior Judge John M. Gerrard. (DCD) (Entered: 09/18/2023)
09/26/2023	<u>327</u>	BRIEF (<i>Prehearing Brief</i>) by Attorney Meredith S. Berwick on behalf of Plaintiff Equal Employment Opportunity Commission. (Attachments: # <u>1</u> Exhibit, # <u>2</u> Exhibit)(Berwick, Meredith) (Entered: 09/26/2023)
09/26/2023	<u>328</u>	RESPONSE <i>Defendants' Pre-Hearing Brief in Advance of October 4, 2023 Hearing</i> by Attorney Elizabeth A. Culhane on behalf of Defendants Drivers Management, LLC, Werner Enterprises, Inc..(Culhane, Elizabeth) (Entered: 09/26/2023)
09/28/2023	329	TEXT ORDER: A telephonic conference is set for Monday, October 2, 2023 at 9:00 AM before Senior Judge John M. Gerrard. Conferencing information will be sent to counsel by separate email. Ordered by Senior Judge John M. Gerrard. (DCD) (Entered: 09/28/2023)
10/02/2023	<u>330</u>	TENTATIVE FINDINGS – The Court will take the parties' motions under advisement and resolve them at trial. Ordered by Senior Judge John M. Gerrard. (LKO) (Entered: 10/02/2023)
10/03/2023	<u>331</u>	PROPOSED EXHIBIT LIST <i>JOINT</i> by Attorney Joshua Pierson on behalf of Plaintiff Equal Employment Opportunity Commission. (Pierson, Joshua) (Entered: 10/03/2023)
10/03/2023	<u>332</u>	PROPOSED WITNESS LIST <i>JOINT</i> by Attorney Joshua Pierson on behalf of Plaintiff Equal Employment Opportunity Commission. (Pierson, Joshua) (Entered: 10/03/2023)
10/04/2023	<u>333</u>	PROPOSED EXHIBIT LIST <i>Supplemental Exhibit List</i> by Attorney Elizabeth A. Culhane on behalf of Defendants Drivers Management, LLC, Werner Enterprises, Inc.. (Culhane, Elizabeth) (Entered: 10/04/2023)
10/04/2023	334	TEXT MINUTE ENTRY for non-jury trial proceedings held before Senior Judge John M. Gerrard in Omaha on 10/04/2023. Evidence by plaintiff and defendants.

		Plaintiff rests. Defendants' renewed Rule 50 motion made at the close of plaintiff's case is overruled. Defendants rest. Matter taken under advisement. Closing arguments and proposed findings of fact and conclusion of law as to back pay and equitable relief by plaintiff are due 30 days from today. Defendants' reply brief due 30 days thereafter. Plaintiff's final rebuttal brief due 10 days thereafter. Case will be submitted. Court's final judgment forthcoming. Non-jury trial ended on 10/04/2023. Appearance for Plaintiff: Meredith S. Berwick, Joshua Pierson, Lauren M. Wilson; for Defendants: Patrick J. Barrett, Elizabeth A. Culhane; Courtroom Deputy: Kathy Miller; Court Reporter: Lisa Grimminger. Sign Language Interpreters: Patricia McCutcheon, CSC, SC:L, and Rebecca Lukkason, RID NIC. Time Start: 9:05 AM; Time Stop: 1:41 PM; Time in Court: 3 Hours 7 Minutes. (KMM) (Entered: 10/04/2023)
10/04/2023	<u>335</u>	WITNESS LIST from Non-Jury Trial held October 4, 2023. (KMM) (Entered: 10/04/2023)
10/04/2023	<u>336</u>	EXHIBIT LIST from Non-Jury Trial held October 4, 2023. (KMM) (Entered: 10/04/2023)
10/05/2023	<u>337</u>	MOTION FOR APPLICATION OF THE STATUTORY MAXIMUM FOR COMPENSATORY AND PUNITIVE DAMAGES by Attorney Elizabeth A. Culhane on behalf of Defendants Drivers Management, LLC, Werner Enterprises, Inc..(Culhane, Elizabeth) (Entered: 10/05/2023)
10/05/2023	<u>338</u>	BRIEF in support of MOTION FOR APPLICATION OF THE STATUTORY MAXIMUM FOR COMPENSATORY AND PUNITIVE DAMAGES <u>337</u> by Attorney Elizabeth A. Culhane on behalf of Defendants Drivers Management, LLC, Werner Enterprises, Inc..(Culhane, Elizabeth) (Entered: 10/05/2023)
10/19/2023	<u>339</u>	BRIEF <i>in Response to Defendants' Motion for Application of the Statutory Maximum</i> by Attorney Meredith S. Berwick on behalf of Plaintiff Equal Employment Opportunity Commission.(Berwick, Meredith) (Entered: 10/19/2023)
10/25/2023	<u>340</u>	REPLY BRIEF in support of MOTION FOR APPLICATION OF THE STATUTORY MAXIMUM FOR COMPENSATORY AND PUNITIVE DAMAGES <u>337</u> by Attorney Elizabeth A. Culhane on behalf of Defendants Drivers Management, LLC, Werner Enterprises, Inc..(Culhane, Elizabeth) (Entered: 10/25/2023)
11/01/2023	<u>341</u>	TRANSCRIPT (UNREDACTED) of Master Index for Transcript of Trial Proceedings before Senior Judge John M. Gerrard held on August 28–September 1, 2023. Total Number of Billable Pages: 6. Total Number of Pages: 6. In accordance with the transcript redaction procedure, available at http://www.ned.uscourts.gov/internetDocs/pom/tran_redaction_procedure.pdf , the transcript can only be viewed at the court's public terminal or purchased through Court Reporter Lisa Grimminger at (402) 437–1908 before the expiration of the Release of Transcript Restriction deadline. The parties have 7 calendar days to file with the court a Notice of Intent to Request Redaction of this transcript. If no such Notice is filed, the transcript may be made remotely electronically available to the public without redaction after 90 calendar days. Redaction Request due 11/22/2023. Redacted Transcript Deadline set for 12/4/2023. Release of Transcript Restriction set for 1/30/2024. (LGG) Modified on 1/31/2024 to release access and remove restricted

		language (ADB). (Entered: 11/01/2023)
11/01/2023	<u>342</u>	<p>TRANSCRIPT (UNREDACTED) of Volume I – Transcript of Trial Proceedings before Senior Judge John M. Gerrard held on August 28, 2023. Total Number of Billable Pages: 117. Pages: 1–5, 126–237. In accordance with the transcript redaction procedure, available at</p> <p>http://www.ned.uscourts.gov/internetDocs/pom/tran_redaction_procedure.pdf,</p> <p>the transcript can only be viewed at the court's public terminal or purchased through Court Reporter Lisa Grimminger at (402) 437–1908 before the expiration of the Release of Transcript Restriction deadline. The parties have 7 calendar days to file with the court a Notice of Intent to Request Redaction of this transcript. If no such Notice is filed, the transcript may be made remotely electronically available to the public without redaction after 90 calendar days. Redaction Request due 11/22/2023. Redacted Transcript Deadline set for 12/4/2023. Release of Transcript Restriction set for 1/30/2024. (LGG) Modified on 1/31/2024 to release access and remove restricted language (ADB). (Entered: 11/01/2023)</p>
11/01/2023	<u>344</u>	<p>TRANSCRIPT (UNREDACTED) of Volume II – Transcript of Trial Proceedings before Senior Judge John M. Gerrard held on August 29, 2023. Total Number of Billable Pages: 218. Pages: 238–455. In accordance with the transcript redaction procedure, available at</p> <p>http://www.ned.uscourts.gov/internetDocs/pom/tran_redaction_procedure.pdf,</p> <p>the transcript can only be viewed at the court's public terminal or purchased through Court Reporter Lisa Grimminger at (402) 437–1908 before the expiration of the Release of Transcript Restriction deadline. The parties have 7 calendar days to file with the court a Notice of Intent to Request Redaction of this transcript. If no such Notice is filed, the transcript may be made remotely electronically available to the public without redaction after 90 calendar days. Redaction Request due 11/22/2023. Redacted Transcript Deadline set for 12/4/2023. Release of Transcript Restriction set for 1/30/2024. (LGG) Modified on 1/31/2024 to release access and remove restricted language(ADB). (Entered: 11/01/2023)</p>
11/01/2023	<u>345</u>	<p>TRANSCRIPT (UNREDACTED) of Volume III – Transcript of Trial Proceedings before Senior Judge John M. Gerrard held on August 30, 2023. Total Number of Billable Pages: 214. Pages: 456–669. In accordance with the transcript redaction procedure, available at</p> <p>http://www.ned.uscourts.gov/internetDocs/pom/tran_redaction_procedure.pdf,</p> <p>the transcript can only be viewed at the court's public terminal or purchased through Court Reporter Lisa Grimminger at (402) 437–1908 before the expiration of the Release of Transcript Restriction deadline. The parties have 7 calendar days to file with the court a Notice of Intent to Request Redaction of this transcript. If no such Notice is filed, the transcript may be made remotely electronically available to the public without redaction after 90 calendar days. Redaction Request due 11/22/2023. Redacted Transcript Deadline set for 12/4/2023. Release of Transcript Restriction set for 1/30/2024. (LGG) Modified on 1/31/2024 to release access and remove restricted language(ADB). (Entered: 11/01/2023)</p>

11/01/2023	<u>346</u>	<p>TRANSCRIPT (UNREDACTED) of Volume IV – Transcript of Trial Proceedings before Senior Judge John M. Gerrard held on August 31, 2023. Total Number of Billable Pages: 230. Pages: 670–899. In accordance with the transcript redaction procedure, available at</p> <p>http://www.ned.uscourts.gov/internetDocs/pom/tran_redaction_procedure.pdf</p> <p>the transcript can only be viewed at the court's public terminal or purchased through Court Reporter Lisa Grimminger at (402) 437–1908 before the expiration of the Release of Transcript Restriction deadline. The parties have 7 calendar days to file with the court a Notice of Intent to Request Redaction of this transcript. If no such Notice is filed, the transcript may be made remotely electronically available to the public without redaction after 90 calendar days. Redaction Request due 11/22/2023. Redacted Transcript Deadline set for 12/4/2023. Release of Transcript Restriction set for 1/30/2024. (LGG) Modified on 1/31/2024 to release access and remove restricted language(ADB). (Entered: 11/01/2023)</p>
11/01/2023	<u>347</u>	<p>TRANSCRIPT (UNREDACTED) of Volume V – Transcript of Trial Proceedings before Senior Judge John M. Gerrard held on September 1, 2023. Total Number of Billable Pages: 75. Pages: 900–974. In accordance with the transcript redaction procedure, available at</p> <p>http://www.ned.uscourts.gov/internetDocs/pom/tran_redaction_procedure.pdf</p> <p>the transcript can only be viewed at the court's public terminal or purchased through Court Reporter Lisa Grimminger at (402) 437–1908 before the expiration of the Release of Transcript Restriction deadline. The parties have 7 calendar days to file with the court a Notice of Intent to Request Redaction of this transcript. If no such Notice is filed, the transcript may be made remotely electronically available to the public without redaction after 90 calendar days. Redaction Request due 11/22/2023. Redacted Transcript Deadline set for 12/4/2023. Release of Transcript Restriction set for 1/30/2024. (LGG) Modified on 1/31/2024 to release access and remove restricted language(ADB). (Entered: 11/01/2023)</p>
11/01/2023	<u>348</u>	<p>TRANSCRIPT (UNREDACTED) of Bench Trial Proceedings before Senior Judge John M. Gerrard held on October 4, 2023. Total Number of Billable Pages: 107. Total Number of Pages: 107. In accordance with the transcript redaction procedure, available at</p> <p>http://www.ned.uscourts.gov/internetDocs/pom/tran_redaction_procedure.pdf</p> <p>the transcript can only be viewed at the court's public terminal or purchased through Court Reporter Lisa Grimminger at (402) 437–1908 before the expiration of the Release of Transcript Restriction deadline. The parties have 7 calendar days to file with the court a Notice of Intent to Request Redaction of this transcript. If no such Notice is filed, the transcript may be made remotely electronically available to the public without redaction after 90 calendar days. Redaction Request due 11/22/2023. Redacted Transcript Deadline set for 12/4/2023. Release of Transcript Restriction set for 1/30/2024. (LGG) Modified on 1/31/2024 to release access and remove restricted language (ADB). (Entered: 11/01/2023)</p>
11/03/2023	<u>349</u>	<p>BRIEF in support of <i>Equitable Relief</i> by Attorney Meredith S. Berwick on behalf of Plaintiff Equal Employment Opportunity Commission. (Attachments:</p>

		# <u>1</u> Exhibit, # <u>2</u> Exhibit, # <u>3</u> Exhibit, # <u>4</u> Exhibit, # <u>5</u> Exhibit)(Berwick, Meredith) (Entered: 11/03/2023)
12/04/2023	<u>350</u>	BRIEF in opposition to <i>Plaintiff's Request for Equitable Relief</i> by Attorney Elizabeth A. Culhane on behalf of Defendants Drivers Management, LLC, Werner Enterprises, Inc..(Culhane, Elizabeth) (Entered: 12/04/2023)
12/04/2023	<u>351</u>	PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW by Attorney Elizabeth A. Culhane on behalf of Defendants Drivers Management, LLC, Werner Enterprises, Inc.. (Culhane, Elizabeth) (Entered: 12/04/2023)
12/14/2023	<u>352</u>	REPLY BRIEF in support of <i>Equitable Relief</i> by Attorney Meredith S. Berwick on behalf of Plaintiff Equal Employment Opportunity Commission. (Attachments: # <u>1</u> Exhibit)(Berwick, Meredith) (Entered: 12/14/2023)
01/10/2024	<u>353</u>	FINDINGS OF FACT AND CONCLUSIONS OF LAW – The Court finds that the defendants intentionally engaged in discrimination when they failed to hire Robinson on the basis of his disability in violation of 42 U.S.C. § 12112(a). The Court finds that Victor Robinson is entitled to backpay in the amount of \$35,682.25 pursuant to 42 U.S.C. § 12117 (incorporating § 2000e–5(g)). The Court finds that injunctive recording and reporting requirements are warranted pursuant to § 2000e–5(g). The plaintiff shall request prejudgment interest in a motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e) no later than 28 days after the entry of judgment. The defendants' motion to apply the statutory maximum for compensatory and punitive damages (filing <u>337</u>) is granted. The Clerk of the Court shall set a status report deadline for June 10, 2024, with the following docket text: Check for certificate of service for records reporting. The Clerk of the Court shall set a case management deadline for January 10, 2027, with the following docket text: Schedule hearing to evaluate injunction. A separate judgment will be entered. Ordered by Senior Judge John M. Gerrard. (MKR) (Entered: 01/10/2024)
01/10/2024	<u>354</u>	JUDGMENT – Pursuant to the jury's verdict (filing <u>323</u>) and the accompanying findings of fact and conclusions of law, judgment is entered for the plaintiff and against the defendants in the amount of \$335,682.25. For a period of three years from the date of this judgment, defendant Werner Enterprises shall report in writing to the plaintiff, no less frequently than every six months, the name and available contact information for any hearing– impaired applicant for an over–the–road truck driving position, the date of that application, whether or not the applicant was hired, the dates on which the employment decision was made and communicated to the applicant, the basis for declining to hire any of the above–described applicants, and whether any applicant hired remains employed with Werner six months after being hired, and if not, the reason for the separation. The defendants shall file proof of such reports with the Court. Ordered by Senior Judge John M. Gerrard. (MKR) (Entered: 01/10/2024)
02/06/2024	<u>355</u>	MOTION for Judgment (<i>Renewed</i>) as a Matter of Law or, In The Alternative, Motion for a New Trial or to Alter or Amend the Judgment by Attorney Elizabeth A. Culhane on behalf of Defendants Drivers Management, LLC, Werner Enterprises, Inc..(Culhane, Elizabeth) (Entered: 02/06/2024)
02/06/2024	<u>356</u>	BRIEF in support of MOTION for Judgment (<i>Renewed</i>) as a Matter of Law or, In The Alternative, Motion for a New Trial or to Alter or Amend the Judgment <u>355</u> by

		Attorney Elizabeth A. Culhane on behalf of Defendants Drivers Management, LLC, Werner Enterprises, Inc..(Culhane, Elizabeth) (Entered: 02/06/2024)
02/06/2024	<u>357</u>	INDEX in support of MOTION for Judgment (<i>Renewed</i>) as a Matter of Law or, In The Alternative, Motion for a New Trial or to Alter or Amend the Judgment <u>355</u> by Attorney Elizabeth A. Culhane on behalf of Defendants Drivers Management, LLC, Werner Enterprises, Inc..(Culhane, Elizabeth) (Entered: 02/06/2024)
02/07/2024	<u>358</u>	MOTION to Amend <i>Judgment</i> by Attorney Meredith S. Berwick on behalf of Plaintiff Equal Employment Opportunity Commission. (Attachments: # <u>1</u> Exhibit)(Berwick, Meredith) (Entered: 02/07/2024)
02/09/2024	<u>359</u>	BILL OF COSTS by Attorney Meredith S. Berwick on behalf of Plaintiff Equal Employment Opportunity Commission. (Attachments: # <u>1</u> Exhibit Declaration of Meredith S. Berwick, # <u>2</u> Exhibit Exhibits A – LL)(Berwick, Meredith) (Entered: 02/09/2024)
02/13/2024	360	TEXT LETTER BY CLERK regarding time to file responses to Bill of Costs <u>359</u> . In order to resolve the taxation of costs issue, the following schedule will apply: The responding party has 14 days from the date of this order to file a response (absent a response, the Clerk will tax costs); the party filing the Bill of Costs has 7 days following the filing of a response to file a reply. Costs will be taxed in accordance with the court's Bills of Costs Handbook available on the court's website. Ordered by Deputy Clerk. (JJB) (Entered: 02/13/2024)
02/14/2024	<u>361</u>	UNOPPOSED MOTION to Extend <i>Deadline to Respond to Defendants' Renewed Motion for Judgment as a Matter of Law</i> by Attorney Meredith S. Berwick on behalf of Plaintiff Equal Employment Opportunity Commission.(Berwick, Meredith) (Entered: 02/14/2024)
02/14/2024	362	TEXT ORDER granting <u>361</u> UNOPPOSED MOTION to Extend <i>Deadline to Respond to Defendants' Renewed Motion for Judgment as a Matter of Law</i> . Ordered by Senior Judge John M. Gerrard. (DCD) (Entered: 02/14/2024)
02/27/2024	<u>363</u>	OBJECTION to Bill of Costs <u>359</u> by Attorney Patrick J. Barrett on behalf of Defendants Drivers Management, LLC, Werner Enterprises, Inc..(Barrett, Patrick) (Entered: 02/27/2024)
02/27/2024	<u>364</u>	DECLARATION regarding OBJECTION to Bill of Costs <u>359</u> <u>363</u> by Attorney Patrick J. Barrett on behalf of Defendants Drivers Management, LLC, Werner Enterprises, Inc..(Barrett, Patrick) (Entered: 02/27/2024)
03/05/2024	<u>365</u>	BRIEF in opposition to <i>Defendants' Renewed Motion for Judgment as a Matter of Law</i> by Attorney Meredith S. Berwick on behalf of Plaintiff Equal Employment Opportunity Commission.(Berwick, Meredith) (Entered: 03/05/2024)
03/05/2024	<u>366</u>	RESPONSE to <i>Defendants' Objection to Plaintiff's Bill of Costs</i> by Attorney Meredith S. Berwick on behalf of Plaintiff Equal Employment Opportunity Commission.(Berwick, Meredith) (Entered: 03/05/2024)
03/06/2024	<u>367</u>	UNOPPOSED MOTION to Extend <i>Reply Brief Deadline</i> to MOTION for Judgment (<i>Renewed</i>) as a Matter of Law or, In The Alternative, Motion for a New Trial or to Alter or Amend the Judgment <u>355</u> by Attorney Elizabeth A. Culhane on behalf of Defendants Drivers Management, LLC, Werner Enterprises, Inc..(Culhane, Elizabeth) (Entered: 03/06/2024)

03/06/2024	<u>368</u>	TEXT ORDER granting <u>367</u> Motion to Extend. Ordered by Senior Judge John M. Gerrard. (DCD) (Entered: 03/06/2024)
03/14/2024	<u>369</u>	Costs Taxed regarding Bill of Costs <u>359</u> in the amount of \$37,898.88 against Drivers Management, LLC, and Werner Enterprises, Inc. (JJB) (Entered: 03/14/2024)
03/19/2024	<u>370</u>	REPLY BRIEF in support of MOTION for Judgment (<i>Renewed</i>) as a Matter of Law or, In The Alternative, Motion for a New Trial or to Alter or Amend the Judgment <u>355</u> by Attorney Elizabeth A. Culhane on behalf of Defendants Drivers Management, LLC, Werner Enterprises, Inc..(Culhane, Elizabeth) (Entered: 03/19/2024)
03/19/2024	<u>371</u>	INDEX in support of MOTION for Judgment (<i>Renewed</i>) as a Matter of Law or, In The Alternative, Motion for a New Trial or to Alter or Amend the Judgment <u>355</u> by Attorney Elizabeth A. Culhane on behalf of Defendants Drivers Management, LLC, Werner Enterprises, Inc.. (Attachments: # <u>1</u> Exhibit 1, # <u>2</u> Exhibit A)(Culhane, Elizabeth) (Entered: 03/19/2024)
03/21/2024	<u>372</u>	MOTION Review Taxation of Costs regarding Costs Taxed <u>369</u> by Attorney Elizabeth A. Culhane on behalf of Defendants Drivers Management, LLC, Werner Enterprises, Inc..(Culhane, Elizabeth) (Entered: 03/21/2024)
03/21/2024	<u>373</u>	BRIEF in support of MOTION Review Taxation of Costs regarding Costs Taxed <u>369</u> <u>372</u> by Attorney Elizabeth A. Culhane on behalf of Defendants Drivers Management, LLC, Werner Enterprises, Inc..(Culhane, Elizabeth) (Entered: 03/21/2024)
04/04/2024	<u>374</u>	BRIEF in opposition to <i>Defendants' Motion to Review Taxation of Costs</i> by Attorney Meredith S. Berwick on behalf of Plaintiff Equal Employment Opportunity Commission.(Berwick, Meredith) (Entered: 04/04/2024)
04/11/2024	<u>375</u>	REPLY BRIEF in support of MOTION Review Taxation of Costs regarding Costs Taxed <u>369</u> <u>372</u> by Attorney Elizabeth A. Culhane on behalf of Defendants Drivers Management, LLC, Werner Enterprises, Inc..(Culhane, Elizabeth) (Entered: 04/11/2024)
05/23/2024	<u>376</u>	MEMORANDUM AND ORDER – Werner's motion for judgment as a matter of law or, in the alternative, motion for a new trial or to alter or amend the judgment (filing <u>355</u>) is granted in part and denied in part. Werner's motion to review taxation of costs (filing <u>372</u>) is granted in part and denied in part. Costs in the amount of \$24,928.24 are taxed in favor of the EEOC and against Werner and will be added to the judgment. The EEOC's motion to amend the judgment (filing 358) is granted. An amended judgment will be entered. Ordered by Senior Judge John M. Gerrard. (MKR) (Entered: 05/23/2024)
05/23/2024	<u>377</u>	AMENDED JUDGMENT – Pursuant to the jury's verdict (filing <u>323</u>), the Court's findings of fact and conclusions of law (filing <u>353</u>), and the accompanying memorandum and order, judgment is entered for the plaintiff and against the defendants in the amount of \$335,682.25, plus prejudgment interest in the amount of \$11,060.67, plus costs pursuant to Fed. R. Civ. P. 54(d) in the amount of \$24,928.24. For a period of three years from the date of this judgment, defendant Werner Enterprises shall report in writing to the plaintiff, no less frequently than every six months as set forth within the order.Ordered by Senior Judge John M. Gerrard. (MKR) Modified on 5/23/2024 (DCD). (Entered: 05/23/2024)
06/21/2024	<u>378</u>	

		<p>NOTICE OF APPEAL regarding Order on Motion for Judgment,, Order on Motion to Amend,, Order on Motion for Miscellaneous Relief,, <u>376</u> , Order on Motion to Exclude,,, Order on Motion for Summary Judgment,, Order on Motion for Partial Summary Judgment,, Order on Motion for Leave, <u>265</u> , Order on Motion to Exclude,,, Order on Motion for Summary Judgment,,, Order on Motion for Leave, <u>266</u> , Order <u>316</u> , Order on Motion in Limine,,,,, <u>303</u> , Findings of Fact & Conclusions of Law,,, <u>353</u> , Jury Instructions <u>322</u> , Judgment,,, <u>354</u> , Judgment,, <u>377</u> , Order <u>305</u> , Order <u>330</u> by Attorney Elizabeth A. Culhane on behalf of Defendants Drivers Management, LLC, Werner Enterprises, Inc.. Filing fee \$ 605, receipt number ANEDC-5112645. (Culhane, Elizabeth) (Entered: 06/21/2024)</p>
06/24/2024	<u>379</u>	<p>NOTIFICATION OF APPEAL AND NOA SUPPLEMENT by Clerk to USCA regarding Judgment <u>354</u> , Memorandum and Order <u>376</u> , Amended Judgment <u>377</u> , Memorandum and Order <u>265</u> , Order <u>305</u> , Memorandum and Order <u>303</u> , Findings of Fact & Conclusions of Law <u>353</u> , Minute Entry Jury Trial – Held on 8/30/2023 314 , Order <u>330</u> , Final Jury Instructions <u>322</u> . Notice of Appeal filed on 6/21/2024 by Defendants Drivers Management, LLC and Werner Enterprises, Inc. NOTIFICATION TO COUNSEL AND PARTIES – FILE REQUEST FOR TRANSCRIPT WITH THE DISTRICT COURT CLERKS OFFICE. (MKR) (Entered: 06/24/2024)</p>

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

EQUAL OPPORTUNITY
EMPLOYMENT COMMISSION,

Plaintiff,

and

ANDREW DEUSCHLE,

Intervenor Plaintiff

vs.

WERNER ENTERPRISES, INC.,

Defendant.

8:18-CV-329

8:18-CV-462

MEMORANDUM AND ORDER

EQUAL OPPORTUNITY
EMPLOYMENT COMMISSION,

Plaintiff,

vs.

DRIVERS MANAGEMENT, LLC and
WERNER ENTERPRISES, INC.,

Defendants.

The plaintiff in these two consolidated cases,¹ the Equal Opportunity Employment Commission (EEOC), is representing the interests of two

¹ Unless otherwise noted, all citations are to the record in the lead case, no. 8:18-cv-329.

prospective commercial truck drivers—Andrew Deuschle and Victor Robinson—who are hearing-impaired. The defendants, Werner Enterprises and its subsidiary, Drivers Management (collectively, Werner) declined to hire Deuschle and Robinson because, Werner says, they couldn't safely complete Werner's training program. The EEOC says Werner violated the Americans with Disabilities Act. The Court finds that there are genuine issues of material facts precluding summary judgment on that claim, and—although the Court will dispense with certain discrete issues—the Court will deny the parties' cross-motions for summary judgment as to the EEOC's primary failure-to-hire disability discrimination claim.

I. BACKGROUND

Werner is a motor carrier transporting goods throughout the United States. [Filing 264 at 3.](#)² Werner requires recent truck driving school graduates and relatively inexperienced applicants to complete its "placement driver program," which Werner says is "designed to enhance safe driving skills, assist new drivers in transitioning to the industry, provide support, and set trainees up for success while promoting highway safety." [Filing 264 at 6-7.](#)

That program includes an over-the-road driving component, during which the applicant—or, "placement driver"—is observed by a trainer while driving, who provides instructions on safety procedures and driving techniques. [Filing 264 at 7.](#) The placement driver and trainer are, Werner says,

² Pursuant to [NECivR 56.1](#), a party moving for summary judgment must provide a statement of material facts about which the movant contends there is no dispute, and the party opposing summary judgment must provide a concise response to that statement of facts, noting any disagreement. Properly referenced material facts in the movant's statement are considered admitted unless controverted in the opposing party's response. [NECivR 56.1\(b\)\(1\)\(B\).](#)

expected to communicate regarding "such topics as emergencies and tutorials about defensive driving, as various driving events occur." [Filing 264 at 7](#). Placement drivers begin by driving in safe environments, gradually progressing to more challenging traffic, terrain, and times of day or night. [Filing 264 at 7-8](#). Werner claims its training is "very different" from a trucking school, and the ability of deaf applicants to complete Werner's training is at the heart of this case.

Both Deuschle and Robinson are deaf, but had completed truck driving school and obtained their commercial driver's licenses. [Filing 269 at 4-5](#);³ No. 8:18-cv-462 [filing 249 at 3-5](#). Deuschle applied to Werner in 2015, and Robinson applied in 2016. [Filing 264 at 9, 13](#). Deuschle had been driving for another company for a few months, but Robinson was inexperienced aside from his driving school. [Filing 264 at 9, 13](#). Both men were granted exemptions from Federal Motor Carrier Safety Administration (FMCSA) physical qualification standards concerning hearing for interstate drivers. *See* [80 Fed. Reg. 18,924-01](#) (Apr. 8, 2015); [20 Fed. Reg. 22,768](#) (Apr. 23, 2015).

Werner ultimately rejected both Deuschle and Robinson. [Filing 264 at 12-13](#); [filing 269 at 10](#). Robinson, specifically, was not hired because Werner

³ Werner objects that Deuschle applied to Werner on March 30, 2015, but didn't actually get his CDL until two days later. [Filing 274 at 3](#). Absent any evidence that discrepancy—or any other timing issues raised in Werner's briefs, *see* [filing 274 at 3-20](#)—actually played a part in Werner's employment decision, the Court is unpersuaded by such *post hoc* flyspecking. *See E.E.O.C. v. Wal-Mart Stores, Inc.*, 477 F.3d 561, 570 (8th Cir. 2007). And as the Court reads Werner's brief ([filing 264](#)), Werner isn't trying at this point to establish a basis for failing to hire Deuschle other than his alleged inability to safely complete its training program. *See* [filing 269 at 23](#). Both parties, in fact, appear to be contesting a lot of facts that in the end don't seem to figure into their actual arguments. The Court has tried to focus on the facts that are legally relevant to the issues and arguments actually presented.

was purportedly unable to identify any way for him to complete Werner's over-the-road training, because there was no way for his instructor to communicate with him without requiring him to take his eyes off the road. [Filing 264 at 12](#). And Werner admits that, regardless of any other factors, it would have rejected Deuschle for the same reason. [Filing 269 at 23](#).

After administrative proceedings, the EEOC brought these cases on Deuschle and Robinson's behalf. The primary claim is failure to hire, in violation of the Americans with Disabilities Act, [42 U.S.C. § 12101 et seq.](#) (ADA). [Filing 112 at 6](#). The EEOC also alleges a claim for unlawful inquiry on a job application, premised on the alleged presence of a "disability-related question" on Werner's application for employment. [Filing 112 at 6-7](#). And the EEOC alleges a claim for illegal classification, based on a "deaf recruitment policy" Werner allegedly adopted. [Filing 112 at 7](#).

II. STANDARD OF REVIEW

Summary judgment is proper if the movant shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law. *See* [Fed. R. Civ. P. 56\(a\)](#). The movant bears the initial responsibility of informing the Court of the basis for the motion, and must identify those portions of the record which the movant believes demonstrate the absence of a genuine issue of material fact. *Torgerson v. City of Rochester*, [643 F.3d 1031, 1042 \(8th Cir. 2011\)](#) (en banc). If the movant does so, the nonmovant must respond by submitting evidentiary materials that set out specific facts showing that there is a genuine issue for trial. *Id.*

On a motion for summary judgment, facts must be viewed in the light most favorable to the nonmoving party only if there is a genuine dispute as to those facts. *Id.* Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the evidence are jury functions, not

those of a judge. *Id.* But the nonmovant must do more than simply show that there is some metaphysical doubt as to the material facts. *Id.* In order to show that disputed facts are material, the party opposing summary judgment must cite to the relevant substantive law in identifying facts that might affect the outcome of the suit. [Quinn v. St. Louis Cty.](#), 653 F.3d 745, 751 (8th Cir. 2011). The mere existence of a scintilla of evidence in support of the nonmovant's position will be insufficient; there must be evidence on which the jury could conceivably find for the nonmovant. [Barber v. C1 Truck Driver Training, LLC](#), 656 F.3d 782, 791-92 (8th Cir. 2011). Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial. [Torgerson](#), 643 F.3d at 1042.

Rule 56 also allows the Court to grant summary judgment as to some issues but not as to others. See [Fed. R. Civ. P. 56\(a\)](#). Upon doing so, the Court may "enter an order stating any material fact—including an item of damages or other relief—that is not genuinely in dispute," and thereby treat such a fact "as established in the case." [Fed. R. Civ. P. 56\(g\)](#). And after giving notice and a reasonable time to respond, the Court may take other actions dictated by its findings—it may grant summary judgment for a nonmovant, grant the motion on grounds not raised by a party, or consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute. See [Fed. R. Civ. P. 56\(f\)](#).

III. DISCUSSION

The parties have filed a host of motions, but they mirror one another: Each party wants to exclude the other's experts, and each party wants judgment as a matter of law on some or all of the issues. The Court will start with the questions presented by the summary judgment motions, as providing the most comprehensive entry into the issues.

To frame the discussion, however, it's helpful to review the basic elements of the EEOC's claim: The Americans with Disabilities Act (ADA) prohibits covered employers from discriminating against "a qualified individual on the basis of disability." [42 U.S.C. § 12112\(a\)](#). Prohibited discrimination under the ADA includes intentional discrimination against a qualified individual in hiring and job application procedures," *id.*, and "limiting, segregating, or classifying a job applicant" in an adverse way because of his disability, § 12112(b)(1). See [Cook v. George's, Inc., 952 F.3d 935, 939 \(8th Cir. 2020\)](#).

1. QUALIFIED INDIVIDUAL WITH A DISABILITY

First, Werner denies that the drivers were qualified individuals. A "qualified individual" is a person "who, with or without reasonable accommodation, can perform the essential functions" of a job. § 12111(8). "Essential functions" are "the fundamental job duties of the employment position the individual with a disability holds." [29 C.F.R. § 1630.2\(n\)\(1\)](#).

(a) Federal Regulations

Werner's primary argument is that it was entitled to rely on regulations promulgated by the Department of Transportation establishing standards for the physical qualification of commercial motor vehicle drivers. [Filing 264 at 17-21](#). Werner points to *Albertson's, Inc. v. Kirkingburg*, in which the Supreme Court held that a vision-impaired driver wasn't a qualified individual with a disability because he didn't satisfy those standards—even through the vision standard had been waived for the plaintiff in that case pursuant to an "experimental" program. [527 U.S. 555, 577 \(1999\)](#). Werner's argument is that the same is true in this case—that the plaintiffs aren't "qualified" because they

don't meet the baseline physical standard, and that Werner doesn't have to accept their exemptions. [Filing 264 at 17-21](#).

But the key to the Supreme Court's holding in *Albertson's* was that the validity of the regulations which established physical standards *at the time* was "unchallenged, they have the force of law, and they contain no qualifying language about individualized determinations." *Id.* at 570.⁴ The Court explained that the waiver program was merely an attempt to gather data relevant to potential regulatory changes, and that an employer wasn't obliged to participate in the experiment instead of choosing "to abide by the otherwise clearly applicable, unamended substantive regulatory standard despite the Government's willingness to waive it experimentally and without any finding of its being inappropriate." *Albertson's*, 527 U.S. at 577.

Perhaps the most important word there is "unamended," because the regulations at issue *now* are different. Today, [49 C.F.R. § 391.11\(b\)\(4\)](#) provides that a person is qualified to drive a commercial motor vehicle if he "[i]s physically qualified to drive a commercial motor vehicle in accordance with subpart E—Physical Qualifications and Examinations of [49 C.F.R. § pt. 391]." But a person is physically qualified if he meets the physical qualification standards *or* "obtained from [the FMCSA] a medical variance from the physical qualification standards." [49 C.F.R. § 391.41\(a\)\(3\)\(i\)-\(ii\)](#).

In other words, unlike in *Albertson's*, a driver with a medical variance now *is* "physically qualified" to drive a commercial motor vehicle for purposes of [49 C.F.R. § 391.11](#). Werner's response is to collaterally attack [49 U.S.C. § 391.41](#), arguing that the hearing exemption program is empirically unfounded.

⁴ In fact, the regulations at that time did provide individualized waivers for persons with impaired limbs or digits, but those weren't pertinent in that case. See [49 C.F.R. § 391.41\(b\)\(1\)-\(2\)](#) (1998) (citing [49 C.F.R. § 391.49](#)).

[Filing 294 at 19-21](#). But as the EEOC notes, the hearing exemption program isn't experimental—for better or worse, the FMCSA has determined, after notice and comment, that granting exemptions "for these drivers to operate property-carrying CMVs will provide a level of safety that is equivalent to or greater than the level of safety maintained without the exemptions." [See 80 Fed. Reg. 18,924-01](#) (Apr. 8, 2015); [20 Fed. Reg. 22,768](#) (Apr. 23, 2015).

Werner isn't opting out of an experimental program waiving federal safety regulations, as in *Albertson's*. Rather, Werner is trying to opt out of an established program operating *within* federal safety regulations. If Werner wants to challenge the wisdom of the current federal regulatory regime, there are procedures for that. But the regulations as they stand provide Werner with no safe harbor for disability discrimination. Perhaps Werner is permitted to set a higher bar than federal regulations do, but that's a separate question.

(b) Essential Functions

Next, Werner argues that neither Deuschle nor Robinson could perform the essential functions of the "Placement Driver" position. [Filing 264 at 21](#).⁵ Evidence to consider in determining whether functions are "essential" may include: (1) the employer's judgment as to which functions are essential; (2) written job descriptions prepared before advertising or interviewing applicants for the job; (3) the amount of time spent on the job performing the function; (4) the consequences of not requiring the incumbent to perform the function; and (5) the current work experience of incumbents in similar jobs. [Knutson v. Schwan's Home Serv., Inc.](#), 711 F.3d 911, 914 (8th Cir. 2013).

⁵ This is a good place to recall that the issue here isn't whether Deuschle and Robinson could have been safe truck drivers. Rather, Werner's argument is focused on the ability to complete its training program, which is why "Placement Driver" is the relevant position here.

Werner argues at length that its placement driver training program is essential. [Filing 264 at 22-23](#). The Court doesn't understand the EEOC to be meaningfully disputing that. *See* [filing 276 at 27-30](#). Rather, the EEOC's position is that deaf drivers could complete that program with reasonable accommodations. *See id.* Werner, on the other hand, insists that "a driver must be able to engage in real-time communication with a trainer while driving" and that the driver must be able "to receive directions and instruction from his or her trainer during the over-the-road driving portion of the placement driver program without taking his or her eyes off the road." [Filing 264 at 24](#).

Perhaps...but the Court isn't persuaded that Werner has demonstrated that *as a matter of law*. Werner dismisses suggestions such as sign language or other non-verbal communication as unreasonable. [Filing 264 at 26-27](#). There is no precise test for what constitutes a reasonable accommodation. *E.E.O.C. v. Convergys Customer Mgmt. Grp., Inc.*, 491 F.3d 790, 796 (8th Cir. 2007). But an accommodation isn't reasonable if it requires an employer to reallocate or eliminate the essential functions of a job. *Higgins v. Union Pac. R.R. Co.*, 931 F.3d 664, 671 (8th Cir. 2019). And an employer need not provide an accommodation that demonstrably would impose an undue hardship on the employer's business. *See Scruggs v. Pulaski Cnty., Ark.*, 817 F.3d 1087, 1092 (8th Cir. 2016).

Werner's argument seems to rely on the idea that a placement driver can't avert his eyes from the road for even a moment. But while the Court agrees that the familiar maxim, "Keep your eyes on the road," has obvious value, there are any number of common occurrences that necessarily divert a driver's eyes elsewhere. The speedometer. Side mirrors. A map.

Clearly, a driver isn't required to maintain a thousand-yard stare on the road ahead at every moment. So, how long can a driver look away, and at what,

without unreasonably compromising safety? Werner hasn't persuaded the Court that as a matter of law, there's no reasonable way to safely communicate with a deaf driver even if the driver has to glance away from the road.

Werner poses hypothetical situations in which "catastrophic harm" could result from, for instance, "avoid[ing] an imminent potential jackknife scenario during an inclement weather situation . . . using only hand signals to guide an inexperienced driver who may have little or no prior experience operating a loaded commercial motor vehicle under those conditions." [Filing 264 at 26-27](#). It's a fair question, though, whether an inexperienced driver under those conditions would fare much better with verbal instructions. It's also a fair question whether accommodating a disability can be "unreasonable" even if it's weighed against a possible worst-case scenario. But most importantly, it's a *jury* question whether an accommodation is reasonable. *See Convergys*, 491 F.3d at 796.

But that also means that the EEOC doesn't get summary judgment on this issue either. The EEOC points to the fact that hearing-impaired drivers can do the job of an over-the-road driver for Werner, as that job was described to applicants. *See filing 269 at 27-28*. But as previously noted, Werner's argument depends on its training program, not the driver's eventual job. And as also previously noted, in determining what functions of a job are "essential," the Court must consider not only the job description, but a number of other factors including the employer's judgment on that point and the possible consequences of not requiring the applicant to perform the function. *See Knutson*, 711 F.3d at 914. The Court is unwilling to say that Werner's policies are unreasonable as a matter of law.

2. AFFIRMATIVE DEFENSES

Werner raised several affirmative defenses. [Filing 121 at 6-8](#). Both parties want summary judgment on some of them, and the EEOC wants the Court to dismiss others.

(a) Qualifications Standards Defenses

Both parties want summary judgment as to Werner's "direct threat" and "business necessity" defenses. [Filing 264 at 27-31](#); [filing 269 at 33-40](#). Those defenses rely on the same statutory language: It is a defense to a charge of disability discrimination

that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation. . . .

§ 12113(a). "The term 'qualification standards' may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." § 12113(b).

(i) Direct Threat

"Direct threat" is an affirmative defense on which the employer bears the burden of proof. [E.E.O.C. v. Wal-Mart Stores, Inc.](#), 477 F.3d 561, 571 (8th Cir. 2007). It requires "an individualized direct threat analysis that relies on the best current medical or other objective evidence in order to protect disabled individuals from discrimination based on prejudice, stereotypes, or unfounded

fear." *Id.* (quotations omitted); see *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 86 (2002); 29 C.F.R. § 1630.2(r). Factors to be considered include: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm. *Wal-Mart*, 477 F.3d at 571; 29 C.F.R. § 1630.2(r).

Werner's argument is largely coextensive with its challenge to the EEOC's *prima facie* claim: Werner says that a deaf placement driver couldn't possibly be coached to respond to a sudden accident or emergency, meaning that the driver would be a "direct threat" to himself or others. [Filing 264 at 27-30](#). But Werner misapprehends the nature of the "direct threat" defense, which demands a "particularized enquiry" into the risks posed or faced by the employee. *Chevron*, 536 U.S. at 86. "An individualized assessment is required to establish that defense as a matter of law." *Baker v. Union Pac. R.R. Co.*, 580 F. Supp. 3d 647, 660 (D. Neb. 2022). Werner's assessment of Deuschle and Robinson wasn't bespoke—it was off-the-rack. Accordingly, the Court agrees with the EEOC that Werner's "direct threat" defense isn't applicable here.

(ii) Business Necessity

Rather, Werner's argument is better framed as a "business necessity" defense: that Werner's qualification standards or other selection criteria, which screen out hearing-impaired placement drivers, are "job-related for the position in question" and "consistent with business necessity." See *Harris v. Union Pac. R.R. Co.*, 953 F.3d 1030, 1035 (8th Cir. 2020) (citing § 12112(b)(6)).

An employer urging a business necessity defense must validate the criteria in question for job-relatedness to the specific skills and physical requirements of the sought-after position. *Id.* To show "job-relatedness," an employer must demonstrate that the qualification standard fairly and accurately measures the individual's actual ability to perform the essential

functions of the job. *Id.* And for a safety-based qualification standard, in evaluating whether the risks addressed by the qualification standard constitute a business necessity, the Court takes into account the magnitude of possible harm as well as the probability of occurrence. *See id.*

As a result, on the facts of this case, Werner's "business necessity" defense is largely coextensive with the EEOC's *prima facie* case. The difference would presumably be that the plaintiff's obligation is to prove that the *plaintiff* can perform the essential functions of the job, while the defendant's burden would be to show that its one-size-fits-all standard is still justified as a fair criterion to more broadly measure an applicant's fitness. But here, the Court doesn't understand either party to argue that Deuschle or Robinson are somehow more or less qualified than any other placement driver who meets the other basic criteria, such as driving school, a CDL, and a hearing exemption. Deuschle and Robinson aren't unique, in other words—the issue here is whether a deaf driver with the proper credentials can complete Werner's training program with a reasonable accommodation, and Deuschle and Robinson are just the plaintiffs representing that category of applicants.

On that understanding, the Court will deny summary judgment on this affirmative defense for the same reasons it denied summary judgment on the EEOC's *prima facie* case: There are genuine issues of material fact about the essential functions of the job, and whether the accommodations sought by Deuschle and Robinson to perform that job are reasonable.⁶

⁶ Whether the jury should be instructed on both the *prima facie* case and the affirmative defense, given their overlapping nature, is a separate question that the Court will take up in the context of trial. It's not immediately obvious why Werner would *want* an affirmative defense instruction, given that it would essentially pose the same questions as the *prima facie* case, except Werner would have the burden of proof.

(b) Undue Hardship

Werner alleges that any accommodation "would cause an undue burden requiring a fundamental alteration in the nature of Werner's services, programs, or activities or undue financial or administrative burdens." [Filing 121 at 8](#). The EEOC wants the Court to dismiss that defense. [Filing 269 at 40-41](#). Werner responds, conclusorily, that the EEOC's proposed accommodations "would fundamentally alter the nature of the business operation" by "prevent[ing] a trainer from providing instantaneous safety training." [Filing 274 at 33](#).⁷

But the "undue hardship" rubric isn't particularly applicable to that argument. Generally, it's a plaintiff's initial burden to show that an accommodation for a disability seems reasonable on its face, *i.e.* ordinarily or in the run of cases. [US Airways, Inc. v. Barnett, 535 U.S. 391, 401 \(2002\)](#). "Once the plaintiff has made this showing, the defendant/employer then must show special (typically case-specific) circumstances that demonstrate undue hardship in the particular circumstances." *Id.* at 402. "Undue hardship" means "significant difficulty or expense incurred," considering several factors, including:

- (i) The nature and net cost of the accommodation needed under this part, taking into consideration the availability of tax credits and deductions, and/or outside funding;
- (ii) The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the

⁷ Fundamental alteration is merely a particular type of undue hardship. [Johnson v. Gambrinus Co./Spoetzl Brewery, 116 F.3d 1052, 1059 \(5th Cir. 1997\)](#).

number of persons employed at such facility, and the effect on expenses and resources;

(iii) The overall financial resources of the covered entity, the overall size of the business of the covered entity with respect to the number of its employees, and the number, type and location of its facilities;

(iv) The type of operation or operations of the covered entity, including the composition, structure and functions of the workforce of such entity, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the covered entity; and

(v) The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.

[29 C.F.R. § 1630.2\(p\)\(2\)](#).

Werner's argument here does not raise—and, actually, expressly disclaims—any reliance on a financial burden. [Filing 274 at 33](#). Instead, Werner only asserts that "instantaneous safety training" is fundamental to its business. But Werner is a trucking company. It carries goods in interstate commerce. The Court is not persuaded that providing training with non-verbal instead of verbal cues would "fundamentally alter" the nature of Werner's business. *Cf. PGA Tour, Inc. v. Martin*, 532 U.S. 661, 686-91 (2001). And Werner has other, more pertinent legal grounds to present its factual argument about safety concerns and the need for verbal interaction. Accordingly, the Court will dismiss this affirmative defense.

(c) Conditions Precedent

The final affirmative defense at issue is Werner's allegation that the EEOC "failed to fulfill all conditions precedent before filing suit, including but not limited to, failing to fulfill in good faith its statutory obligation to conciliate before filing a lawsuit." [Filing 121 at 8](#). The EEOC points out that its obligation to conciliate requires *only* that it must inform the employer about the specific allegation, describing both what the employer has done and which employees (or what class of employees) have suffered as a result, and try to engage the employer in some form of discussion (whether written or oral), so as to give the employer an opportunity to remedy the allegedly discriminatory practice. [Mach Mining, LLC v. E.E.O.C., 676 U.S. 480, 494 \(2015\)](#).

The facts establishing the EEOC's efforts at conciliation are undisputed. [Filing 260 at 21-22](#). Werner argues merely that the EEOC's account is focused on the failure-to-hire claim, not its unlawful inquiry or illegal classification claims. So, Werner says, the Court should deny the EEOC's motion to dismiss the defense, at least as to those claims. [Filing 274 at 35](#). Rather unhelpfully, the EEOC's reply just asserts that Werner "admittedly waives" this defense as to the failure-to-hire, and "waives the same defense against the EEOC by failing to brief it adequately." [Filing 282 at 2](#).

But the Court sees the problem as more fundamental: What is this defense? It's not a jury question—regarding whether the conciliation requirement was met, the U.S. Supreme Court has consigned fact-finding to the Court. [Mach Mining, 575 U.S. at 494-95](#). And "[s]hould the court find in favor of the employer, the appropriate remedy is to order the EEOC to undertake the mandated efforts to obtain voluntary compliance." *Id.* at 495.

This is, in other words, not an issue to be raised at trial. And Werner isn't asking the Court, right now, to order the EEOC to conciliate anything.

The Court will deny the EEOC's motion to dismiss this defense. But whether the Court could be persuaded that the EEOC actually failed to conciliate any claims, and that Werner is entitled to any sort of relief—if Werner even moved for relief—is a completely separate question, and one the Court need not answer until it's asked.

3. UNLAWFUL INQUIRY

Werner contends that the EEOC's claim regarding Werner's employment application form—or, what Werner calls its "pre-2013 application form"—is time-barred because Werner stopped using that form in 2013, and moot because Werner doesn't intend to start using it again. [Filing 264 at 31-33](#).⁸

The EEOC's first argument is based on the voluntary cessation doctrine: that a defendant cannot always moot a case simply by voluntarily ceasing its unlawful conduct after the plaintiff files suit. *See Prowse v. Payne*, 984 F.3d 700, 702 (8th Cir. 2021). Otherwise, a defendant could engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where he left off, repeating this cycle until he achieves all his unlawful ends. *Id.* And a defendant faces a "heavy burden" to establish mootness by way of voluntary cessation. *Id.* at 703.

But the Court finds that burden to have been met here. It's been 10 years since the form was changed. Nor are there any circumstances suggesting the type of manipulative behavior the voluntary-cessation exception is meant to address. *See Let Them Play MN v. Walz*, 556 F. Supp. 3d 968, 978 (D. Minn.

⁸ The allegedly unlawful question on the form was, "Is there any reason you might be unable to perform the functions of the job for which you have applied as described in the attached job description?" [Filing 276 at 41](#), *see* [filing 112-1](#). But the *substance* of the form, and its legality, aren't at issue.

[2021](#)). It seems reasonably clear that Werner hasn't just responded to litigation in an attempt to *create* mootness.

But that implicates the EEOC's other argument, which is that there are factual questions about whether Werner really stopped using the form at issue. The EEOC argues:

Werner's claim that it has not made any unlawful disability-related inquiry through its employment application since July 2013 is not an undisputed fact. In February 2016, the EEOC asked Werner to provide "a blank copy of your employment application." Werner produced an application with the unlawful question. In September 2016, the EEOC asked Werner to provide "a copy of . . . all documents related to the recruiting process for the relevant time period" (defined as "January 1, 2014 to the present"). Werner again produced an application with the unlawful question. Self-serving contradictory testimony - offered years after these productions were made - creates a disputed fact, not an undisputed one.

[Filing 276 at 41-42](#) (citations omitted).

But the Court is not persuaded that Werner's production of that form during discovery (or whatever sort of investigation was happening in 2016) is enough to generate an issue of material fact as to whether the form has been *used* since 2013—as opposed to the sort of "metaphysical doubt" that doesn't suffice to prevent summary judgment. *See Torgerson, 643 F.3d at 1042*. It doesn't appear to be disputed that neither Deuschle nor Robinson were asked to complete the questioned form. [Filing 264 at 9, 14](#). Nor has the EEOC identified anyone else who's been asked, since 2013, to complete that form.

In other words, the evidence before the Court provides no genuine basis to dispute Werner's evidence that the form was changed in 2013, and nothing to undermine Werner's argument that 10 years of good behavior is enough to establish genuine cessation of its allegedly unlawful conduct. And, the Court notes, should that change, the EEOC is well equipped to act promptly in response. Accordingly, the Court will grant the defendant's motion for summary judgment as to this claim.

4. ILLEGAL CLASSIFICATION

That leaves the EEOC's illegal classification claim. The gist of that claim is that Werner's internal operating procedures—as reflected in a training document for recruiters—provided a different workflow for applications from hearing-impaired drivers: If the recruiter is "aware of an FMCSA waiver- or a hearing issue (IE: leaving a message on a relay service) do not Pre-Approve the application." [Filing 112-2 at 1](#). Instead, the recruiter would send the completed application "to the manager basket," and management would decide whether or not to move forward. [Filing 112-2 at 1](#). Werner insists that there's no genuine issue of fact regarding this claim because "the language of the training document is undisputed." [Filing 264 at 33](#). The Court disagrees.

Disability discrimination includes "limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee." § 12112(b)(1). Werner argues that its procedure doesn't adversely affect hearing-impaired applicants, because referring the application to a manager is simply meant to ensure that the applicant meets driver qualification standards. [Filing 264 at 33-34](#).

But that's not what the training document says. What the training document says is that an application from a hearing-impaired driver doesn't

get pre-approved—instead, it's referred to a manager and it may or may not return to the recruiter. [Filing 112-2](#). Pre-approved applications get conditional offers of employment. [Filing 276 at 19](#). But pursuant to the training document, hearing-impaired applicants don't. *See* [filing 112-2](#). And as the EEOC notes, [filing 276 at 43](#), Werner's argument that it's just checking to make sure hearing-impaired drivers meet Werner's standards isn't compelling, when the rest of Werner's brief is devoted to explaining why hearing-impaired drivers inherently *don't* meet its standards.

On the face of the training document, hearing-impaired applicants don't get the same pre-approval as any other qualified applicant—instead, they're sent off for some other approval process that isn't explained (and the result of which, at least for Deuschle and Robinson, seems to have been rejection). Perhaps that process *doesn't* adversely affect hearing-impaired applicants, as Werner argues. But the training document, standing alone, doesn't establish that. And evidence of how Werner actually treats hearing-impaired applicants is obviously disputed. Accordingly, the Court will deny Werner's motion for summary judgment as to this claim.

5. EXPERT WITNESSES

Both parties have expert witnesses. Each party has moved to exclude the other's experts pursuant to [Fed. R. Evid. 702](#) and *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

The objective of the *Daubert* inquiry is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field. *Am. Auto. Ins. Co. v. Omega Flex, Inc.*, 783 F.3d 720, 722 (8th Cir. 2015). In exercising its gatekeeping function, the Court must make a preliminary assessment of whether the reasoning or

methodology underlying the proposed expert testimony is valid and of whether that reasoning or methodology properly can be applied to the facts in issue, focusing specifically on the methodology and not the conclusions. *In re Wholesale Grocery Prod. Antitrust Litig.*, 946 F.3d 995, 1000-01 (8th Cir. 2019). But "cases are legion that under *Daubert*, liberal admission is prevalent and courts should resolve doubts regarding the usefulness of an expert's testimony in favor of admissibility." *Id.* (cleaned up).

That said, few if any of the arguments raised in either side's motion actually take issue with an expert's methodology. Rather, they present more basic objections such as foundation, relevance, and unfair prejudice.

(a) William C. Adams

First, the EEOC objects to the proffered testimony of William C. Adams, who opines

to a reasonable degree of certainty that the training of a deaf student driver during the over-the-road portion of Werner's Student Driver Training Program would create unsafe conditions including the risk of injury or potential fatality to the student, the driver trainer, the motoring public and pedestrians in the vicinity of the [commercial motor vehicle], as well the potential for serious property damage.

[Filing 251-2 at 1](#). The EEOC argues that even if Adams has extensive experience training truck drivers—which he claims, *see* [filing 251-2 at 1](#)—he doesn't have any education, knowledge, or experience training *deaf* truck drivers. [Filing 250 at 3](#). So, the EEOC says, he lacks the necessary

qualifications to testify as an expert on the feasibility of training deaf truck drivers. [Filing 250 at 3](#).

The Court disagrees. The EEOC doesn't challenge Adams' expertise on the training of truck drivers generally, and the central issue in this case is whether the ordinary methods of training truck drivers can be safely adapted to accommodate hearing-impaired trainees. An expert may proceed as far as, but no further than, his specialized knowledge assists him in going. [Hirchak v. W.W. Grainger, Inc.](#), 980 F.3d 605, 609 (8th Cir. 2020). But Adams' proffered expertise allows him to testify to what training a truck driver involves, what sorts of situations might arise, what sort of communication between trainer and trainee is required—and whether the accommodations suggested by the EEOC's experts are consistent with safe training practices.⁹ The Court will deny the EEOC's motion.

(b) Don Olds

The EEOC proffers the testimony of Don Olds, who trains hearing-impaired truck drivers. [See filing 246-4](#). Olds proposes to opine that

- A. because standards are the same for all drivers (i.e., age, CDL, and DOT/FMCSA medical examiners' certificate), drivers with a DOT/ FMCSA hearing exemption who meet those standards are just as qualified to drive a truck interstate as those drivers who are not required to get such an exemption;

⁹ The EEOC also objects to Adams' proffered testimony in support of Werner's "direct threat" affirmative defense. [Filing 250 at 6-9](#). Given the Court's disposition of that affirmative defense, the Court regards the EEOC's argument here as moot. If not, the EEOC can always object at trial.

- B. drivers with a DOT/FMCSA hearing exemption can be safely and effectively taught to qualify to drive commercial motor vehicles interstate (i.e., pass their CDL written and road tests) by using sign language, hand signals, and other accommodations in a way that is safe for the student, instructor, and public;
- C. drivers with a DOT/FMCSA hearing exemption can do all the essential functions of an interstate truck driver safely with or without accommodation; and
- D. drivers with a DOT/FMCSA hearing exemption, regardless of their verifiable driver experience, can safely do all parts of Werner's new hire orientation, evaluation, and training, with or without accommodations.

[Filing 246-4 at 5](#). Werner objects to any opinion from Olds *other* than whether a hearing-impaired driver can be safely accommodated in the over-the-road driving portion of its placement driver program. *See* [filing 247 at 19](#).

Werner's argument is that because it doesn't dispute whether hearing-impaired drivers can operate trucks safely, the proffered opinion testimony is irrelevant. But the Court agrees with the EEOC that explaining how hearing-impaired drivers are evaluated, how they work, and the methods used to train them, may be relevant to helping the jury understand whether Werner's safety concerns are legitimate and any proposed accommodations are reasonable. *See* [filing 254 at 4-6](#).

Werner also objects to testimony about what the parties call "the Blake case," in which a placement driver was involved in an accident. [Filing 247 at 21](#). The parties disagree about who brought up that subject in the first place,

and what it purportedly illustrates. *See* [filing 247 at 21-23](#); [filing 254 at 8-9](#); [filing 259 at 5-6](#).

This is a rabbit hole the Court declines to crawl into. It's not at all apparent to the Court that this will come up at trial, and if it does, whether it's best considered as an expert testimony issue or a more basic question of hearsay and foundation. In any event, the Court is ill-prepared to address it outside the context of trial evidence. If the matter arises at trial, Werner can object then.

Similarly, the Court declines to address, at this point, Werner's objections to Olds' rebuttal opinions. [Filing 247 at 23](#). Very generally summarized, in his rebuttal report, Olds reviewed Adams' opinions and opined that Adams' opinions were flawed because of his inexperience with deaf drivers. [Filing 246-5](#). Whether Olds would be permitted to say, for instance, that Adams statements reflect a "bias" against deaf drivers isn't a basis to exclude Olds' opinions wholesale, and the Court is not inclined at this point to blue-line Olds' expert report to find each and every instance in which he might have crossed a line. Werner can object at trial, based on what actually happens at trial.

Finally, Werner argues that Olds "should not be permitted to provide additional and undisclosed opinions and testimony 'in more detail' than the opinions disclosed in his expert report." [Filing 247 at 24](#). This, too, is something the Court can't address at this point. The EEOC represents that Olds' testimony at trial "will be confined to the opinions and bases for them expressed in his report." [Filing 254 at 9](#). The Court has no reason to believe otherwise, and in any event can't properly opine on any opinion testimony it hasn't seen yet. The Court will deny Werner's motion to limit Olds' testimony.

(c) Dr. Steven Arndt

Werner also objects to the opinions of Dr. Steven Arndt, who says that there "are multiple communication methods and channels that would reasonably accommodate Mr. Robinson and Mr. Deuschle, allowing them to safely complete Werner's on-the-road training portion of its Student Driver Training Program." [Filing 246-6 at 5](#). Arndt's opinion is based on his expertise in psychology, industrial engineering, and "human factors"—"the application of psychology, human factors, human perception, human decision making and human attention, human appreciation of risk, knowledge gained through experience, and training, to assess the environment, the task to be accomplished, the capabilities and limitations of tools available, and the organizational system in place." [Filing 246-6 at 6](#).

Werner objects to Arndt's testimony on several grounds. First, Werner claims that lay persons are "perfectly qualified to decide how effective or distracting various forms of communications may be to a driver operating a vehicle." [Filing 247 at 25](#). The Court simply disagrees. True, courts must guard against invading the province of the jury on a question which the jury was entirely capable of answering without the benefit of expert opinion. *Am. Auto. Ins. Co. v. Omega Flex, Inc.*, 783 F.3d 720, 725 (8th Cir. 2015). But here, Arndt's opinion is grounded in an imposing review of scientific literature involving, among other things: human perception, the causes of motor vehicle accidents, and the efficacy of non-verbal communication methods. See [filing 246-6 at 74-76](#). Or perhaps more basically: The Court found Arndt's reasoning to be illuminating, and believes that the jury would also find it helpful—without invading the jury's province.

Next, Werner argues that Arndt went outside the scope of his expertise when opining on ADA accommodations. [Filing 247 at 28-29](#). But whether an

accommodation is reasonable is a question of fact, see *Convergys*, 491 F.3d at 796, and an opinion isn't objectionable just because it embraces an ultimate issue to be decided by the trier of fact, see *Scheerer v. Hardee's Food Sys., Inc.*, 148 F.3d 1036, 1038 (8th Cir. 1998) (citing Fed. R. Evid. 704(a)). And the Court agrees with the EEOC that the factual bases for Arndt's opinion were set forth in his report. To the extent that Werner claims Arndt's fact-gathering was inadequate, that's an appropriate subject for cross-examination.

Werner also complains about the relevance of Arndt's opinion regarding whether deaf drivers may safely operate vehicles in contexts other than Werner's over-the-road placement driver program, and any opinion regarding the "Blake case." [Filing 247 at 32-33](#). The Court reads those as basically the same objections Werner asserted to most of Olds' opinions, and will overrule them at this point for the same reasons.

Finally, Werner claims that Arndt's opinions are cumulative of Olds', and should be excluded under Fed. R. Evid. 403. [Filing 247 at 33-35](#). The Court simply disagrees. Olds and Arndt reached similar conclusions regarding the accommodations available for hearing-impaired drivers, but came to those conclusions in different ways: Olds from years of real-world experience in trucks, and Arndt from experience and education in science, engineering, and human behavior and perception. Their opinions reinforce one another, but they're not cumulative. The Court will deny Werner's motion to exclude Arndt's opinions.

6. MOTION FOR LEAVE TO SUBMIT ADDITIONAL AUTHORITY

Finally, Werner also filed a motion for leave to submit new authority with respect to the EEOC's motion for summary judgment—newly issued EEOC guidance that, Werner says, supports its argument. [Filing 291](#). That

guidance provides the following illustration of what is or isn't a reasonable accommodation of a hearing disability:

An employee with a hearing disability requests training to operate a forklift at a large hardware store. For safety reasons, the employer requires that forklift operators be able to communicate with a spotter employee while operating the machine. The employee and the employer contact the [Job Accommodation Network] JAN, which suggests that they explore whether the employee could be accommodated using a visual alert on a smartwatch, a vibrating pager with a light signal, or a smartphone or tablet on a dashboard mount to allow communication with the spotter. If the employer determines that there is a reasonable accommodation that does not pose an undue hardship, based on the facts of the specific work setting and tasks, it must provide the accommodation and allow the employee training on the forklift. If no reasonable accommodation can be provided absent undue hardship, the employer may deny the employee training on a forklift.

[Filing 291-1 at 2.](#)

The Court will grant Werner's request for leave, and considers its additional authority ([filing 291-1](#)) submitted *instanter*—for what it's worth. But the point made is anodyne: That an employer isn't required to accommodate a hearing-impaired employee if to do so would pose an undue hardship. That's well-established, and was discussed above. The question here is whether accommodating hearing-impaired placement drivers would be so

unsafe as to excuse Werner from providing accommodations—and the new guidance Werner offers doesn't answer that question.

IV. CONCLUSION

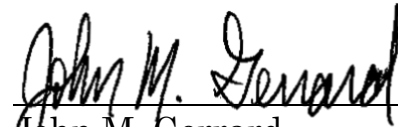
As set forth more specifically above,

IT IS ORDERED:

1. The defendant's motion to exclude ([filing 244](#)) is denied.
2. The plaintiff's motion to exclude ([filing 249](#)) is denied.
3. The defendant's motion for summary judgment ([filing 263](#)) is granted in part and denied in part.
4. The plaintiff's motion for summary judgment ([filing 268](#)) is granted in part and denied in part.
5. The defendants' motion for leave to submit new authority ([filing 291](#)) is granted.

Dated this 31st day of March, 2023.

BY THE COURT:



John M. Gerrard
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

EQUAL OPPORTUNITY
EMPLOYMENT COMMISSION,

Plaintiff,

vs.

DRIVERS MANAGEMENT, LLC and
WERNER ENTERPRISES, INC.,

Defendants.

8:18-CV-462

ORDER

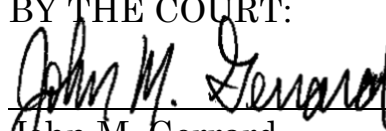
For the reasons stated in the accompanying memorandum and order,

IT IS ORDERED:

1. The defendants' motion to exclude ([filing 224](#)) is denied.
2. The plaintiff's motion to exclude ([filing 229](#)) is denied.
3. The defendants' motion for summary judgment ([filing 243](#)) is granted in part and denied in part.
4. The plaintiff's motion for summary judgment ([filing 248](#)) is granted in part and denied in part.
5. The defendants' motion for leave to submit new authority ([filing 264](#)) is granted.

Dated this 31st day of March, 2023.

BY THE COURT:



John M. Gerrard
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff,

vs.

DRIVERS MANAGEMENT, LLC,
and WERNER ENTERPRISES, INC.

Defendants.

8:18-CV-462

MEMORANDUM AND ORDER

This matter comes before the Court on both parties' motions in limine ([filing 278](#), [filing 282](#), [filing 290](#)). For the convenience of the parties, the Court has organized this Order into three categories of motions – the first of which are uncontested and will all be granted, the second of which will all be overruled without prejudice and may be reasserted if or as needed at trial, and the final the Court will handle in the ways described below.

I. UNCONTESTED MOTIONS

The plaintiff's #9, 12, 13, 21, and 24 are uncontested and granted. The defendants' #7, 8, 11, 12, 13, 15 are uncontested and granted.

II. OVERRULED WITHOUT PREJUDICE

Several of the parties' motions will be better adjudicated during the trial. Based on the briefs and assurances made by both parties, these motions do not raise an issue of unfair prejudice and the Court does not consider it prudent to rule on these matters prior to hearing the evidence. The plaintiff's #11, 14, 16,

22, and 23, and the defendants' #10, 14, and 16, are overruled without prejudice and may be reasserted if needed during the trial.

III. OTHER MOTIONS

PLAINTIFF'S MOTIONS

Plaintiff's #1: Medical Records

The plaintiff seeks to exclude some of Victor Robinson's medical records related to his high blood pressure and counseling he received. The plaintiff argues these records are excludable under both [Fed. R. Evid. 401](#) and [403](#) as irrelevant or, if relevant, unfairly prejudicial. The plaintiff also argues that Robinson's psychiatric records are privileged. The defendants assert that Robinson has waived any privilege, and the documents are relevant to Robinson's claim for damages for emotional distress.

The plaintiff has indicated it does not intend to produce evidence at trial related to Robinson's blood pressure as support for its claim for emotional distress. It follows that the defendants could not introduce evidence of that physical manifestation of his emotional distress. The defendants may question Robinson about any alleged inconsistent statements regarding whether the rejection from Werner raised his blood pressure, but they cannot introduce extrinsic evidence to prove the inconsistent statements. [Fed. R. Evid. 608\(b\)](#). The plaintiff's motion regarding the blood pressure medical records is therefore granted.¹

¹ But, if the plaintiff inquires about the effect Werner's rejection had on Robinson's blood pressure, the issue would not be collateral, and the defendants could introduce the medical records. See [Batiste-Davis v. Lincare, Inc.](#), 526 F.3d 377, 381 (8th Cir. 2008).

Other counseling records are not collateral, however, and may be admitted. By seeking damages for emotional distress, Robinson has put his medical condition at issue, and has waived the psychotherapist-patient privilege. *See Batiste-Davis*, [526 F.3d at 381](#) (citing *Schoffstall v. Henderson*, [223 F.3d 818, 823](#) (8th Cir. 2000)).

If the plaintiff introduces evidence, including any testimony, as to physical pain or emotional suffering, the defendants can counter with their own evidence. The plaintiff argues this case is distinguishable and the privilege has not been waived because the plaintiff is only seeking damages for "garden variety emotional distress," rather than damages related to a diagnosis of post-traumatic stress disorder as alleged in *Batiste-Davis* or "extreme emotional distress" as alleged in *Schoffstall*. The Court will cabin the admissible evidence within the framework of the types of emotional damages claimed by the plaintiff. In this respect, the plaintiff's motion is overruled without prejudice to be reasserted if needed at trial.

Plaintiff's #2, 7, 8: Robinson's Job Performance at Other Companies

The plaintiff seeks to exclude references to accidents in which Robinson was involved and references to Robinson's job performance at companies he worked at after Werner failed to hire him. According to the plaintiff, these issues "did not occur during his truck driver training," and so they are irrelevant and excludable under Rule 401. Further, the plaintiff argues that such evidence is excludable under Rule 403 due to the danger of confusing the issue in this trial with "broader issue of the safety of deaf truck drivers generally." [Filing 283 at 4](#). The Court agrees.

The accidents are relevant to the issue of backpay. But for reasons explained below, evidence of the accidents will not be admitted in front of the jury for this purpose because the Court, not the jury, will determine whether

and in what amount Robinson is entitled to backpay. And the post-rejection accidents could not have effected whether Werner was reasonable in its decision not to hire Robinson.

Under [Fed. R. Evid. 403](#), the Court finds that the relevance and probative value, if any, of Robinson's subsequent job performance is outweighed by the risk of confusing the issues, undue delay, and wasting time. Asking about the various accidents will devolve into examinations of each accident, who was at fault, what could have been done to prevent it, etc. Ultimately, the accidents have little relevance to the subjects about which Robinson will testify – his personal experience with Werner, and his experience and knowledge about how trucking companies train deaf drivers. Further, evidence of Robinson's performance with subsequent employers, including personnel files, are also irrelevant and inadmissible.

However, Werner is welcome to inquire as to any accidents or issues which occurred while Robinson was in training, because this is relevant to Werner's safety arguments. Therefore, the plaintiffs' motions on these issue is granted, except as to any accidents which occurred while Robinson was in training.

Plaintiff's #3 / Defendants' #5: References to Deuschle Case

The plaintiff seeks to exclude the outcome and verdict of the related case tried by this Court earlier this year, *E.E.O.C. and Andrew Deuschle v. Werner Enterprises*, case no. 8:18-cv-329. [Filing 282 at 1](#). The defendants seek to exclude "[e]vidence of or reference to claims brought against Werner" in the *Deuschle* case, "including but not limited to any reference to the currently-pending Count III. . . except if Andrew Deuschle is called," in which case the defendants want to reference the lawsuit as it relates to Deuschle's bias and credibility. [Filing 278 at 1](#). Both motions will be granted.

A jury's verdict is not evidence. *Anderson v. Genuine Parts Co., Inc.*, 128 F.3d 1267, 1272 (8th Cir. 1997). "Rather, a jury's verdict simply represents findings of fact, based on the evidence presented to it." *Id.* The plaintiff may present facts surrounding Werner's treatment of Deuschle. *Id.* And Deuschle's involvement in a lawsuit against one of the defendants is fair game for impeachment. But the verdict itself is not evidence, and may not be referenced, nor may the plaintiff inquire as to discrimination lawsuits filed against the defendants. If either party needs to reference the *Deuschle* case for impeachment purposes, the parties shall refer to the case as "another proceeding." *Anderson*, 128 F.3d at 1272 n.4.

Plaintiff's #4: Jamie Hamm's Research

The plaintiff asserts that Jamie Hamm has not been identified as an expert and should not be permitted to testify regarding "her work with industry groups, including the FMCSA, her limited search of scientific literature, and speaking with an unidentified employee of the Nebraska Department of Transportation," which allegedly informed her decision not to hire Robinson. *Filing 283 at 6.*

Lay witnesses may opine as to their personal knowledge or perception acquired through their industry experience. *E.g.*, *Burlington N. R.R. Co. v. State of Neb.*, 802 F.2d 994, 1004 (8th Cir. 1986). The alleged deficiencies in Hamm's decision-making process do not merit excluding that evidence because these deficiencies can be contested on cross-examination. The Court will allow Hamm to testify as to the reasons behind her decision not to hire Robinson – and will allow the plaintiff to cross-examine regarding any shortcomings it sees

in her research, rationale, or credentials in making the hiring decision.² See *Hartzell Mfg., Inc. v. Am. Chem. Tech., Inc.*, 899 F.Supp. 405, 409 (D. Minn. 1995).

Notably, the statements and documents on which Hamm relied are hearsay, and may only be referenced as to their effect on Hamm's decision, and may not be offered for their truth.

Plaintiff's #5, 10: Reasons for Not Hiring Robinson

The plaintiff argues that the defendants should be precluded from arguing that Werner failed to hire Robinson for any reason other than his deafness. It is unclear to the Court what, in particular, the plaintiff seeks to exclude or prevent, and so these motions are overruled without prejudice to be reasserted at trial.

Plaintiff's #6, 7, 8, and Supplemental: Backpay

In a reversal of positions from the previous trial, the plaintiff seeks to prevent the jury from hearing evidence of backpay and mitigation while the defendants seek to introduce it. Whether, and in what amount, Robinson is entitled to backpay is an issue for the Court to decide. See *Pedigo v. P.A.M. Transp., Inc.*, 60 F.3d 1300, 1303 (8th Cir. 1995); see also *Maitland v. Univ. of Minn.*, 155 F.3d 1013, 1018 (8th Cir. 1998). The Court determined in the *Deuschle* case that it would submit the backpay issue to the jury in an advisory capacity, in the interests of judicial efficiency and because the backpay compensatory damages would be relevant to any award of punitive damages. The Court is solely responsible for managing efficiency.

² This line of questioning may also support a punitive damages award because it is relevant to whether Werner's decision not to hire Robinson was made in good faith.

In this case, the backpay and mitigation issue is more contentious than the *Deuschle* case. It is therefore proper and more efficient for the Court to determine these issues following the trial, outside the presence of the jury, to avoid keeping the jury longer than necessary. The defendants will not be prejudiced by excluding this evidence because the jury will only have emotional distress damages to consider as a reference for punitive damages, which would be a lower dollar amount than if the jury considered both wages and emotional distress.

The plaintiffs' motions on this issue are granted. Evidence regarding backpay and mitigation, personnel files from Robinson's other employers, and Robinson's performance at jobs held after Werner rejected him will not be presented to the jury.

Plaintiff's #15: Direct Threat and Undue Hardship

The plaintiffs seek to exclude references to Werner's dismissed affirmative defenses, and ask that Werner be prohibited "from offering any evidence, statement, or argument that Mr. Robinson would pose a direct threat of harm if employed or that his employment would create an undue hardship." [Filing 283 at 14](#). The plaintiffs further seek the Court to prohibit the use of the phrases "direct threat" and "undue hardship" on the basis of [Fed. R. Evid. 403](#). The Court agrees, and such language or evidence will not be allowed. To the extent these phrases appear on exhibits, such as answers to interrogatories, these phrases should be redacted. However, Werner will still be able to put on evidence of safety or other concerns with deaf drivers. Some evidence which pertains to these issues may be ruled on subject to an appropriate objection at trial. The plaintiffs' motion in this respect will be granted.

Plaintiff's #17 / Defendants' #4: Werner's Treatment of Deaf Applicants

The plaintiffs argue that Werner's hiring of hearing-impaired employees for non-driver positions is not relevant and should be excluded. The defendants argue that the plaintiffs should not be able to introduce evidence of Werner's treatment of other deaf applicants.

The plaintiffs are seeking punitive damages against Werner, arguing that Werner has animus towards hearing-impaired and/or deaf people. The fact that Werner has hired deaf or hearing-impaired people for jobs other than truck driving is relevant to this issue, and is probative of whether Werner was motivated by safety concerns or by animus in denying Deuschle's application for employment. On this matter, the plaintiffs' motion is denied.

One issue in this case is whether Werner didn't hire Robinson because it could not safely train him, or whether that reason was pretextual and motivated by animus. Evidence of other deaf drivers, who may have not been hired for a variety of reasons, is relevant to this issue, and relevant to the punitive damages claim. Werner may identify any deaf applicants it did hire to rebut this evidence.

Plaintiff's #18: Robinson's Obligation to Propose Accommodations

The plaintiff seeks "to prohibit Werner from offering any argument, evidence, or suggestion that Victor Robinson had an obligation to propose all possible accommodations at the time of his application." [Filing 283 at 15](#). The motion will be granted.

A plaintiff is not required to specifically identify an accommodation; he must only provide "enough information that, under the circumstances, [it] can be fairly said to know" that the plaintiff sought accommodation for his disability. [Ballard v. Rubin](#), 284 F.3d 957, 962 (8th Cir. 2002) (quoting [Taylor v. Phoenixville Sch. Dist.](#), 174 F.3d 142, 159 (3d. Cir. 1999)). The defendants may inquire as to the conversations between Hamm and Robinson about any

accommodations that might be feasible or workable, as these conversations speak to the reasonableness of Werner's actions. But the plaintiff's motion that the defendants may not offer argument, evidence, or suggestion that Robinson had an *obligation* to propose *all possible accommodations* is granted.

Plaintiff's #19: Expert Reports

The reports relied on by the plaintiff's experts are fair game for cross-examination and impeachment . . . unless, of course, the "door is opened" on other evidentiary grounds. The motion is granted as to the admissibility of those reports and studies as substantive evidence.

Plaintiff's #20: FMCSA Hearing Exemption Process

The plaintiff objects to introducing evidence or argument regarding the FMSCA hearing exemption, both as a process on its own and as Robinson actually engaged in it. Werner is entitled to a higher standard of safety than the federal regulations. So, Werner may present evidence to the jury about any alleged deficiencies in the regulatory process of providing hearing waivers, both generally and as engaged in by Robinson.³ Werner may contest the belief that a driver in possession of an FMCSA waiver is just as safe as any other driver by contesting the regulatory process. On these issues, the plaintiffs' motion is denied.

³ If Werner engages in this line of questioning, this opens the door for the plaintiffs to explain the rationale behind the waiver process, and the regulatory process by which the Department of Transportation created the rule. This would likely lengthen the trial. Caution should be exercised – there had better be some "meat on the bones" before entering into this line of inquiry.

DEFENDANTS' MOTIONS

Defendants' #1: Subjective Beliefs of Discrimination

Relying on Rule 401, 403 and 701, and on some case law, Werner seeks to exclude statements by the plaintiff and by Werner employees. Werner cites cases suggesting that a plaintiff's "subjective beliefs and bare allegations" that he or she was discriminated against "are insufficient to establish" an ADA prima facie case. *Erenberg v. Methodist Hosp.*, 240 F. Supp. 2d 1022, 1031 (D. Minn. 2003).

But here, the plaintiff's subjective beliefs are not the only ones proffered. And the allegations are not "bare." Rather, the testimony of other employees of Werner supports the plaintiffs' claim that Werner intentionally and perhaps maliciously discriminated against deaf drivers. The evidence is not unfairly prejudicial because it is coming from Werner's own employees, who are testifying as to their personal knowledge. Even if these employees were not personally involved in the decision not to hire Robinson, this testimony would help the jury to understand how Werner employees felt about deaf drivers generally and how they felt about their own actions.

To the extent Werner seeks to exclude testimony because it is a "legal conclusion" that will "confuse the jury," this only justifies preventing the plaintiffs from specifically asking whether certain behavior was "discrimination" or "discriminatory." Allowing witnesses to opine as to whether certain behavior was "discrimination" might confuse the jury once they read the jury instructions—they may conflate the colloquial, common understanding of "discrimination" with the legal claim of "disability discrimination" as alleged in this case. The plaintiffs can inquire as to how people felt about certain behaviors, but may not ask whether certain behavior

was discriminatory. (There are plenty of other ways to phrase such questions that do not literally implicate the legal issues in this case.)

Defendants' #2: Stray Remarks

Werner seeks to exclude certain emails and chat messages where its employees made discriminatory remarks about deaf applicants. Werner claims these are "stray remarks," which are insufficient to establish discrimination. *Fitzgerald v. Action, Inc.*, 521 F.3d 867, 876-77 (8th Cir. 2008) (citing *Fisher v. Pharmacia & Upjohn*, 225 F.3d 915, 922 (8th Cir. 2000)). However, stray remarks are neither irrelevant nor inadmissible. *Id.*

The defendants argue that Jamie Hamm was the sole person responsible for not hiring Robinson, and evidence of other decision-makers' comments would be irrelevant and unfairly prejudicial. However, the plaintiff asserts that Marsh "supervised Robinson's recruiter, communicated with Robinson about his application, had private conversations about Robin's application with" Jamie Hamm, "was present on the phone call in which Werner rejected Robinson, and, in fact, directed Robinson to make that phone call to the company." [Filing 289 at 3](#). These facts indicate that Marsh was a high-level Werner official whose statements are relevant to whether Werner discriminated against Robinson. These statements are relevant to the punitive damages claim and to whether Werner was motivated by safety or by animus in failing to hire Robinson.

The defendants' motion on this issue will be overruled without prejudice to reassert at trial. The Court may sustain any objection to statements where the content, context, and timing do not evidence discrimination from high-level

Werner employees sufficiently related to Robinson, either by the timing of the statements or the identity of the declarant.⁴

Defendants' #3: Other Trucking Companies

Werner seeks to exclude all evidence of other trucking companies' policies regarding hearing-impaired drivers as irrelevant. The plaintiffs seek to introduce deposition testimony from five other trucking companies which train deaf drivers. Evidence of other companies' training policies is relevant to the issue of whether Werner's refusal to train deaf drivers is reasonable.

Werner cites a Seventh Circuit Court of Appeals case, *EEOC v. Schneider Nat., Inc.*, 481 F.3d 507, 510 (7th Cir. 2007), for the unremarkable position that an employer "is entitled to determine how much risk is too great for it to be willing to bear," and "[t]he fact that another employer and . . . the worker himself are willing to assume a risk does not compel [an employer] to do likewise." But no one is compelling Werner to behave the same way as other companies. Evidence of how other companies train and accommodate hearing-impaired drivers will be helpful to the jury in determining the *reasonableness* of Werner's safety decisions. Werner may inform the jury that it is entitled to have a higher level of safety than other companies, but the jury will determine whether that decision is reasonable. (And contrary to Werner's arguments, a jury verdict regarding a different case with significantly different facts *and issues* than this one does not vindicate Werner's position on safety. A jury verdict is not evidence. *Anderson*, 128 F.3d at 1272.)

Werner argues the evidence compares other companies' 2021 policies to Werner's 2016 policies, which makes them irrelevant. The other companies'

⁴ The parties are advised that the Court is likely to make the same rulings as to particular chat messages and emails which were admitted in the *Deuschle* proceedings.

2021 policies, however, are relevant because these policies have a tendency to show a material fact—the reasonableness of Werner's actions—is less likely. Werner had the opportunity to challenge the policies of its competitors on cross-examination and inquire as to those companies' 2016 policies, and Werner has designated testimony from these depositions for the jury to hear. Werner is not unfairly prejudiced, nor is the evidence irrelevant.

Werner also suggests that the five company policies offered by the plaintiffs are both too many and too few. [Filing 279 at 10](#). These concerns are overruled. While potentially prejudicial to Werner, this evidence is not unfairly so, and will be admitted. Werner's motion on this matter is denied.

Defendants' #6: Subsequent Remedial Measures

Like in the *Deuschle* case, the defendants assert that the plaintiff's exhibits showing Werner's current policies regarding its application process are excludable as irrelevant and as subsequent remedial measures under [Fed. R. Evid. 407](#). The plaintiff argues this evidence goes to "feasibility of precautionary measures," an exception to Rule 407. In the *Deuschle* case, these measures were admissible as relevant to the "feasibility of whether Werner could have safely trained Deuschle, and whether the over-the-road aspect of Werner's placement driver training program was an 'essential function' of employment." [Filing no. 327](#) in case no. 8:18-cv-329.

Unlike Deuschle, who had five months of trucking experience before applying to Werner, Robinson had no trucking experience. But, Werner's policy change still speaks to whether its over-the-road portion of the placement driver training program was truly an "essential function" at the time Robinson applied, if this portion of the training was later significantly reduced. The evidence is less probative than in the *Deuschle* case, but its relevance still outweighs any potential prejudice. The feasibility and relevance of Werner's

change in policies is relevant to the issues in this case, despite the factual differences between Robinson's and Deuschle's claims.

Defendants' #9: Punitive Damages

The defendants assert that punitive damages should not be submitted to the jury in this case. The defendants rely on Eighth Circuit case law that punitive damages are not warranted in an ADA case if the theory of discrimination is "novel." [Filing 279 at 13](#) (citing *Canny v. Dr. Pepper/Seven-Up Bottling Group, Inc.*, 439 F.3d 894 (8th Cir. 2006)).

The plaintiff's theory of discrimination is not novel. The plaintiff alleges that Werner intentionally and, potentially maliciously or recklessly, discriminated against deaf people in contravention of their civil rights. The plaintiff does not assert, as the defendants claim, that Werner was *required* to hire a deaf applicant, or that Werner is not entitled to consider safety in its hiring decisions. Rather, the plaintiff asserts Werner acted with unlawful discriminatory intent by failing to hire Robinson based on *unreasonable* or pretextual concerns for safety. The issues in this case, for the jury to decide, are whether Werner was motivated by safety or by animus in failing to hire Robinson, whether Werner's decision that it could not safely train a deaf driver in its placement driver program was reasonable, and whether Werner could have reasonably accommodated a deaf person in that position.

In *Canny*, punitive damages were not warranted where an employer "*reasonably* perceived itself caught between federal regulations under the Occupational Safety and Health Administration and federal law under the ADA." [439 F.3d at 903](#) (emphasis added). While Werner claims that it acted only considering safety in not accommodating deaf applicants for its driver training program, the plaintiff intends to present evidence which rebuts that. This evidence includes remarks made by Werner employees mocking deaf

applicants, which, in the other proceeding, a witness admitted were insensitive and embarrassing. Other expected testimony would corroborate potential inferences the jury can make about the alleged animus behind Werner's failure to hire Robinson.

The defendants argue that the plaintiff's "novel" theory of discrimination was rejected by a jury already, and evidence of that rejection should be admitted if punitive damages are submitted to the jury. But the theory is not novel, and the *Deuschle* jury verdict cannot vindicate Werner in this case because a jury verdict (in a separate proceeding with *different issues*) is not evidence. [Anderson, 128 F.3d at 1272](#).

As in the last case, the jury may be instructed (if the evidence is sufficient) that it may award punitive damages if the defendants "acted with malice or reckless indifference" to Robinson's right not to be discriminated against on the basis of a disability. The jury will be properly instructed on the plaintiff's burden in assessing whether to award punitive damages. The plaintiff's expected evidence, if believed, would support a jury's finding that the defendants acted with reckless indifference or malice towards Robinson's right not to be discriminated against.

The Court will handle punitive damages, and evidence of Werner's financial status, in the same way they were handled in the *Deuschle* case. Prior to presenting evidence of Werner's financial status and net worth, the plaintiff, outside the presence of the jury, must seek the Court's determination and permission on the issue of punitive damages.

IT IS ORDERED:

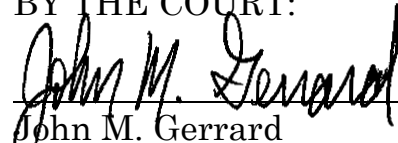
1. The plaintiffs' motion in limine ([filing 282](#)) is granted in part and denied in part.

2. The plaintiffs' supplemental motion in limine ([filing 290](#)) is granted.

3. The defendants' motion in limine ([filing 278](#)) is granted in part and denied in part.

Dated this 23rd day of August, 2023.

BY THE COURT:



John M. Gerrard
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff,

vs.

DRIVERS MANAGEMENT, LLC and
WERNER ENTERPRISES, INC.,

Defendants.

8:18-CV-462

ORDER

This matter is before the Court on both parties' objections to the designated deposition testimony of Morgan Baker-Maloy, Christopher Hilkemann, Clarence Easterday, Jr., Wayne Cederholm, Lathen Whited, and Lindsay Wilbert:

Objections to Wayne Cederholm Deposition Testimony

All of the parties' objections will be overruled subject to the following:

24:19-23 Overruled, but the deposition should include, for completeness, 24:24-25:1.

36:11-37:2 Overruled, but the deposition should include, for completeness, 37:3-6.

Clarence Easterday

All of the parties' objections will be overruled subject to the following:

23:21-24:12 Overruled, but the deposition should include, for completeness, 24:13-22.

Christopher Hilkemann

All of the parties' objections will be overruled subject to the following:

10:12-24 Overruled, but the deposition should include, for completeness, 10:25-11:9.

Lathen Whited

All of the parties' objections will be overruled except the following:

Defendants' Objections

26:4-27:2 Sustained only as to 26:25-27:2, hearsay, foundation

Plaintiff's Objections to Counter-Designations

12:18-25 Overruled, but the deposition should include, for completeness, 13:1-3

Lindsey Wilbert

All of the parties' objections will be overruled.

Morgan Baker-Maloy

All of the parties' objections will be overruled subject to the following:

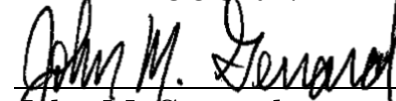
56:6-8 Overruled, but the deposition should include, for completeness, 56:10.

56:22-57:5 Overruled, but the deposition should include, for completeness, 57:6-8, 10-14, 16-20.

IT IS SO ORDERED.

Dated this 27th day of August, 2023.

BY THE COURT:



John M. Gerrard
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff,

vs.

DRIVERS MANAGEMENT, LLC,
and WERNER ENTERPRISES, INC.

Defendants.

8:18-CV-462

MEMORANDUM AND ORDER

This matter comes before the Court on a motion for a partial directed verdict from the plaintiff, the Equal Employment Opportunity Commission (EEOC), under [Fed. R. Civ. P. Rule 50\(a\)\(2\)](#). [Filing 313](#). The plaintiff has requested a directed verdict on the issue of causation for its claims of failure to hire and failure to accommodate. The plaintiff asserts that the defendants, Drivers Management, LLC, and Werner Enterprises, Inc. (collectively "Werner"), have admitted that they did not hire Victor Robinson because he was deaf.

The parties have stipulated that Robinson had a disability as that term is defined in the Americans with Disabilities Act when he applied to Werner, and Werner knew that Robinson had a disability. [Filing 286 at 2](#). Werner did not hire Victor Robinson as an over-the-road truck driver. [Filing 286 at 2](#). "The only function Werner claims Victor Robinson could not perform, with or without accommodation, is the trainer-observed over-the-road component of its student driver program." [Filing 286 at 2](#).

To succeed on its failure to hire claim, the plaintiff must prove: (1) Robinson was a qualified individual—that is, he could perform the essential

functions of the job with or without a reasonable accommodation, (2) Werner refused to hire Robinson, and (3) Werner would have hired Mr. Robinson but for his deafness.¹ See *Higgins v. Union Pac. R.R. Co.*, 931 F.3d 664, 669 (8th Cir. 2019). And to succeed on its claim of failure to accommodate, the plaintiff must show: (1) Mr. Robinson could have performed the essential functions of the job if he had been provided with an accommodation, (2) providing an accommodation would have been reasonable, (3) Werner failed to provide an accommodation, and (4) Werner would have hired Mr. Robinson but for his need for an accommodation. See *Hopman v. Union Pac. R.R.*, 68 F.4th 394, 402 (8th Cir. 2023).

Werner's position throughout this case has been that it did not hire Robinson because it did not believe he was qualified. Werner's position is that Robinson was unqualified because he was an inexperienced truck driver who could not engage in an asserted essential function of the over-the-road truck driver job, and no reasonable accommodation would have enabled him to safely do so. The essential function at issue is the trainer-observed over-the-road component of the student driver program, now known as the placement driver program. Filing 286 at 2.

Werner argues that it "determined [Robinson] was unable to safely perform required aspects of the job." Filing 315 at 3. It is true, as Werner argues, that the ADA "does not prohibit adverse action due to a consequence of a disability, such as being unable . . . to perform essential job duties." *Id.*

¹ The Eighth Circuit has declined to address what standard of causation applies in ADA discrimination cases – "but for" or "motivating factor." See *Anderson v. KAR Global*, no. 22-2808, 2023 WL 5493754, at *5 n.1 (8th Cir. Aug. 25, 2023). The EEOC does not concede that "but for" is the proper causation standard, but it contends that even the higher standard is satisfied here. Filing 313 at 1 n.1.

(quoting *Wells v. Helena Lab. Corp.*, no. 1:18-cv-74, 2019 WL 13252673, at *24 (E.D. Tex. May 2, 2019)). But whether Robinson was able to safely perform the essential functions of the job is a different element of the plaintiff's prima facie case, not a theory that defeats the plaintiff's causation requirement. See *Davidson v. Am. Online Inc.*, 337 F.3d 1179, 1189 (10th Cir. 2003). Rather than disproving causation, Werner's evidence and arguments raise a contestable issue of fact that Robinson was qualified to do the over-the-road truck driver job for which he applied.

Werner has provided no alternate theory of causation. Werner does not argue that it did not hire Robinson because he did not provide the proper paperwork (e.g., case no. 8:18-cv-329), because of any poor performance (e.g., *Anderson*, 2023 WL 5493754, at *4; *Wells*, 2019 WL 13252673, at *24), or because of a violation of company policies (e.g., *Hamilton v. Sw. Bell Tel. Co.*, 136 F.3d 1047, 1052 (5th Cir. 1998)). See filing 315 at 2-3.

Causation is not at issue based on

- Werner's answer to Interrogatory #48 in plaintiff's exhibit 66; Rich Johnson's testimony that he knew Werner would not hire an inexperienced deaf driver who had to go through Werner's over-the-road training program;
- Erin Marsh's testimony that there were no issues with Robinson's criminal background check, employment history, medical history, accident history, or motor vehicle history report;
- William Adams' expert opinion that it is unsafe to communicate with deaf drivers in a trainer-observed over-the-road setting; and

- Jamie Hamm's determination that Werner could not safely train Robinson because he would have to take his eyes off the road to communicate with a trainer due to his deafness.

In other words, the uncontradicted evidence indicates that Werner determined that it could not safely train Robinson because of his deafness.

Werner claims that it failed to hire Robinson because he could not communicate with a trainer without diverting his eyes from the road—but he couldn't do that *because he is deaf*. He could not engage in instantaneous communication without the use of hand signals or other accommodations, but that's *because he is deaf*. Werner argues it did not hire him because it did not believe it could safely train him . . . again, *because he is deaf*. All of Werner's explanations are premised on Robinson's deafness, so his disability is the but-for cause of Werner's hiring decision as a matter of law. *See, e.g., Davidson, 337 F.3d at 1189*. If the jury finds that the EEOC met its burden to show that Robinson was a qualified individual, the Court finds that Robinson's disability is the but-for cause of Werner's hiring decision as a matter of law. *See Davidson, 337 F.3d at 1189; Bostock v. Clayton Cnty, Ga., 140 S.Ct. 1731, 1742 (2020)*.

The issues in this case are (and always have been) whether the trainer-observed over-the-road training component of the placement driver program is an essential function, whether Robinson could perform that function, and whether any reasonable accommodation could have enabled him to perform that function. The jury will be instructed on these issues. The jury will also consider Werner's affirmative defense—whether its policy of not training deaf drivers by requiring instantaneous two-way communication as part of the trainer-observed over-the-road component of its placement driver program is job related and consistent with business necessity.

Werner's failure to hire Robinson—an action the parties stipulate to—is an adverse employment action. *Davidson*, 337 F.3d at 1189. So, the EEOC must prove its prima facie case, and, if it has, Werner must prove its affirmative defense. But if the plaintiff has proven that Robinson was able to perform the essential functions of the over-the-road truck driver job, with or without a reasonable accommodation, and Werner has not proven its affirmative defense, the Court finds as a matter of law that Mr. Robinson suffered an adverse employment action because of his disability. The issue of causation will not be submitted to the jury because no reasonable juror could find that Werner failed to hire Mr. Robinson for any reason other than his deafness.

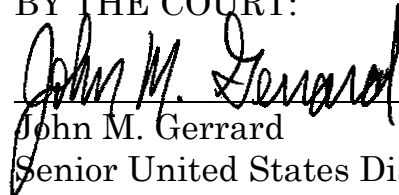
The Court finds, as a matter of law, if the plaintiff proved the other elements of its prima facie case, Robinson suffered an adverse employment action because of his disability.² *E.g.*, *EEOC v. Dolgencorp, LLC*, 899 F.3d 428, 436 (6th Cir. 2018). The issue of causation will not be submitted to the jury because no reasonable juror could find that Werner failed to hire Robinson for any reason other than his deafness, under either a "but-for" or a "motivating factor" standard. *E.g.*, *Estate of Pepper v. Whitehead*, 780 F.3d 856, 861 (8th Cir. 2015). The remaining issues, i.e., whether Robinson could perform the essential functions of the job, whether any reasonable accommodation would have enabled him to do so, and whether Werner's decision was justified by business necessity, will be submitted to the jury. For these reasons,

² Both the plaintiff's failure-to-hire and failure-to-accommodate claims require proof that the employee suffered an adverse employment decision because of a disability. *Higgins*, 931 F.3d at 669; *Hopman*, 68 F.4th at 402. Because the Court has resolved these issues as a matter of law, the jury will not be instructed on this element of the plaintiff's claims.

IT IS ORDERED that the plaintiff's motion for a partial directed verdict is granted.

Dated this 31st day of August, 2023.

BY THE COURT:



John M. Gerrard
Senior United States District Judge

FILED
U.S. DISTRICT COURT
DISTRICT OF NEBRASKA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

2023 SEP -1 PM 1:34
OFFICE OF THE CLERK

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff,

vs.

DRIVERS MANAGEMENT, LLC and
WERNER ENTERPRISES, INC.,

Defendants.

8:18-CV-462

FINAL JURY INSTRUCTIONS

INSTRUCTION #1: INTRODUCTION

Ladies and gentlemen of the jury, the evidence has been fully submitted to you. It is now my job to instruct you on the law to apply to this case. In a few minutes, the lawyers will present closing arguments on behalf of their respective clients and afterward, it will then be your duty to begin fully deliberating this case in the jury room.

The instructions I gave you at the beginning of the trial and during the trial remain in effect. I now give you some additional instructions.

You must, of course, continue to follow the instructions I gave you earlier, as well as those I give you now. You must not single out some instructions and ignore others, because all are important. This is true even though some of those I gave you at the beginning of trial are not repeated here.

The instructions I am about to give you now, as well as those I gave you earlier, are in writing and will be available to you in the jury room.

INSTRUCTION #2: DUTY OF JURY

It will be your duty to decide from the evidence whether the plaintiff has proved its claim, and whether the defendants have proved their affirmative defense. From the evidence, you will decide what the facts are. You are entitled to consider that evidence in the light of your own observations and experiences in life. You may use reason and common sense to draw deductions or conclusions from facts which have been established by the evidence. You will then apply those facts to the law which I give you in these and in my other instructions, and in that way reach your verdict. You are the sole judges of the facts; but you must follow the law as stated in my instructions, whether you agree with it or not.

Do not let sympathy, or your own likes or dislikes, influence you. The law demands of you a just verdict, unaffected by anything except the evidence, your common sense, and the law as I give it to you. You should not take anything I have said or done during the trial as indicating what I think of the evidence or what I think your verdict should be.

INSTRUCTION #3: EVIDENCE

I have mentioned the word "evidence." "Evidence" includes the testimony of witnesses; documents and other things received as exhibits; and any facts that have been stipulated, that is, formally agreed to by the parties.

Certain things are not evidence. I will list those things for you now:

1. Statements, arguments, questions and comments by lawyers are not evidence.
2. Objections are not evidence. Parties have a right to object when they believe something is improper under court rules. You should not be influenced by the objection. If I sustained an objection to a question, you must ignore the question and not try to guess what the answer might have been.
3. Testimony that I struck from the record, or told you to disregard, isn't evidence and must not be considered.
4. Anything you see or hear about this case outside the courtroom is not evidence.
5. Exhibits that are identified by a party but not received in evidence are not evidence.

Finally, some of you may have heard the terms "direct evidence" and "circumstantial evidence." You are instructed that you should not be concerned with those terms. The law makes no distinction between direct and circumstantial evidence. You should give all evidence the weight and value you believe it is entitled to receive.

INSTRUCTION #4: EXHIBITS

Exhibits have been admitted into evidence and are to be considered along with all the other evidence to assist you in reaching a verdict.

You are not to tamper with the exhibits or their contents. Each exhibit should be returned into open court, along with your verdict, in the same condition as it was when received by you.

Some of the documents received into evidence have been partially redacted, meaning certain information in the documents has been blacked out. There are various reasons why redactions are necessary. You may give the unredacted information in the document whatever weight you choose. However, you should not consider the redacted portions. Do not speculate on the content of the redacted information or the reasons for its redaction.

INSTRUCTION #5: STIPULATED FACTS

The parties have stipulated—that is, they have agreed—that the following facts are true. You must, therefore, treat these facts as having been proved.

1. For the purposes of these instructions, the defendants, Werner Enterprises, Inc. and Drivers Management, LLC (collectively, "Werner"), are treated as a single employer.
2. Werner is a motor carrier engaged in transporting truckload shipments of commodities in interstate and intrastate commerce throughout the United States.
3. Victor Robinson is deaf and was deaf at the time he applied to Werner.
4. Victor Robinson applied to work at Werner in January 2016.
5. Werner did not hire Mr. Robinson.
6. When Mr. Robinson applied to Werner in January 2016, he had no previous over-the-road driving experience.
7. The only function Werner claims Mr. Robinson could not perform, with or without accommodation, is the trainer-observed over-the-road component of its student driver program (now known as the "placement driver program"), where a trainer rides along with a student driver for observation and training.
8. The Federal Motor Carrier Safety Administration (FMCSA) is an agency in the United States Department of Transportation that regulates the trucking industry in the United States.

INSTRUCTION #6: CREDIBILITY OF WITNESSES

In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness said, or only part of it, or none of it.

In deciding what testimony to believe, consider the witness's intelligence, the opportunity the witness had to have seen or heard the things testified about, the witness's memory, any motives that witness may have for testifying a certain way, the manner of the witness while testifying, whether that witness said something different at an earlier time, the general reasonableness of the testimony, and the extent to which the testimony is consistent with any evidence that you believe.

In deciding whether or not to believe a witness, keep in mind that people sometimes hear or see things differently and sometimes forget things. You need to consider therefore whether a contradiction is an innocent misrecollection or lapse of memory or an intentional falsehood, and that may depend on whether it has to do with an important fact or only a small detail.

Some testimony was presented to you in the form of depositions, that is, answers that the witnesses made under oath to questions asked by the lawyers before trial. You should consider that testimony, and judge its credibility, as you would that of any witness who testified here in person. And for depositions that were not video recorded, you should not place any significance on the manner or tone of voice that was used to read the witnesses' answers to you.

Similarly, you must evaluate interpreted witness testimony as you would any other testimony, and give it the same weight you would have had the witness spoken English. You must not assume that a witness is more credible, or less credible, because that witness relies on the assistance of an interpreter to communicate.

Some witnesses, because of education or experience, are permitted to state opinions, and the reasons for those opinions, about matters requiring special knowledge or skill. You should judge this testimony in the same way that you judge the testimony of any other witness. The fact that such person has given an opinion does not mean that you are required to accept it. Give the testimony whatever weight you think it deserves, considering the reasons given for the opinion, the witness's qualifications, and all of the other evidence in the case.

INSTRUCTION #7: CORPORATE AND GOVERNMENT PARTIES

A corporation like Werner can act only through its employees. A corporation is bound by the knowledge possessed by its employees. It is also bound by acts or omissions of its employees that are within the scope of their employment.

The EEOC is an agency of the federal government, and it is here representing the interests of Victor Robinson, a private individual. Essentially, in this lawsuit, the EEOC's lawyers are acting as Mr. Robinson's lawyers and are representing him, just as Werner's lawyers are representing Werner.

The fact that one party is a government agency and another is a corporation must not influence your deliberations or your verdict. All the parties are equal before the law, and should be treated as equals, no better and no worse.

INSTRUCTION #8: BURDEN OF PROOF

You will have to decide whether certain facts have been proved by the greater weight of the evidence. A fact has been proved by the greater weight of the evidence, if you find that it is more likely true than not true. You decide that by considering all of the evidence and deciding what evidence is more believable.

You have probably heard the phrase "proof beyond a reasonable doubt." That is a stricter standard than "more likely true than not true." It applies in criminal cases, but not in this civil case, so put it out of your mind.

INSTRUCTION #9: FAILURE TO HIRE

A. Issues

The plaintiff contends that Werner discriminated against Victor Robinson by failing to hire him as an over-the-road truck driver even though he could have performed the job's essential functions.

Werner contends that Mr. Robinson couldn't safely perform one of the essential functions of the job. Specifically, Werner alleges the trainer-observed over-the-road component of its placement driver program is an essential function, and there was no reasonable accommodation that would enable Robinson to safely complete that function.

B. Elements of Claim

Before the plaintiff can recover against Werner on its failure to hire claim, it must prove, by the greater weight of the evidence, each and all of the following:

1. Mr. Robinson had the skill, experience, education, and other requirements for an over-the-road truck driver job and could do the job's essential functions, either with or without a reasonable accommodation; and
2. Werner failed to hire Mr. Robinson as an over-the-road truck driver.

C. Effect of Findings

If the plaintiff has not met its burden of proof, then your verdict must be for Werner on this claim.

On the other hand, if the plaintiff has met its burden of proof, indicate your finding on the verdict form for this claim. Then, you must consider Werner's affirmative defense of "business necessity," as explained in Instruction #11.

INSTRUCTION #10: FAILURE TO ACCOMMODATE

A. Issues

The plaintiff contends that Werner discriminated against Victor Robinson when it did not hire him as an over-the-road truck driver because Werner failed to reasonably accommodate his disability so that he could perform the essential functions of the job.

Werner contends that there was no reasonable accommodation that would enable him to safely perform an essential function of the job. Specifically, Werner alleges the trainer-observed over-the-road component of its placement driver program is an essential function, and there was no reasonable accommodation that would enable Robinson to safely complete that function.

B. Elements of Claim

Before the plaintiff can recover against Werner on its failure to accommodate claim, it must prove, by the greater weight of the evidence, each and all of the following:

1. Mr. Robinson could have performed the essential functions of an over-the-road truck driver job if he had been provided with an accommodation;
2. Providing an accommodation would have been reasonable;
and
3. Werner failed to provide any reasonable accommodation.

C. Effect of Findings

If the plaintiff has not met its burden of proof, then your verdict must be for Werner on this claim.

On the other hand, if the plaintiff has met its burden of proof, indicate your finding on the verdict form for this claim. Then, you must consider Werner's affirmative defense of "business necessity," as explained in Instruction #11.

INSTRUCTION #11: BUSINESS NECESSITY

A. Issues

Werner contends that its failure to hire or accommodate Mr. Robinson was justified by business necessity—specifically, that in 2016, as a policy, Werner required drivers with less than 6 months' experience to engage in instantaneous two-way communication as part of the trainer-observed over-the-road component of its placement driver program.

B. Elements of Defense

If you find that in January and February of 2016, after Mr. Robinson applied to Werner, Werner's policy had the effect of denying a job to Mr. Robinson, then Werner must prove, by the greater weight of the evidence, each and all of the following:

1. Werner's policy was uniformly applied;
2. Was job-related;
3. Was consistent with business necessity; and
4. Could not have been met by Mr. Robinson even with a reasonable accommodation.

C. Principles of Law

To show that a policy is "job-related," an employer must demonstrate that the policy fairly and accurately measures an applicant's actual ability to perform the essential functions of the job and is sufficiently related to safe and efficient job performance.

In evaluating whether the risks addressed by a policy constitute a "business necessity," you should consider the magnitude of the possible harm as well as the possibility of that harm occurring.

D. Effect of Findings

If you find that Werner met its burden of proof on its affirmative defense, then your verdict must be for Werner on its defense, and you have completed your deliberations.

If, on the other hand, Werner has not met its burden of proof, then you must determine the amount of damages for any claim for which the plaintiff met its burden of proof, as explained in Instruction #9 or Instruction #10.

INSTRUCTION #12: ESSENTIAL FUNCTIONS, DEFINED

The term "essential functions" means the fundamental job duties of the employment position for which a person has applied. Not all job duties are essential. In determining whether a duty is essential, you should consider:

- The employer's judgment as to which functions of the job are essential;
- The consequences of not requiring the person to perform the function;
- The amount of time spent on the job performing the function in question;
- The work experience of persons who have held the job;
- The current work experience of persons in similar jobs; and
- Whether the function is highly specialized and the individual in the position was hired for his expertise or ability to perform the function.

No one factor is necessarily controlling, and you should consider all of the evidence in deciding whether a duty is essential.

INSTRUCTION #13: REASONABLE ACCOMMODATION, DEFINED

Under the ADA, to "accommodate" a disability is to make some change that will let a person with a disability safely perform the essential functions of the job.

An accommodation is "reasonable" if it is effective and its costs are not clearly disproportionate to the benefits that it will produce.

Reasonable accommodations may include: making existing facilities used by employees readily accessible to and usable by individuals with disabilities; acquiring or modifying equipment or devices; appropriate adjustment or modification of examinations, training materials or policies; providing qualified readers or interpreters; and other similar accommodations. An accommodation isn't reasonable if it requires an employer to eliminate an essential function of a job.

INSTRUCTION #14: BUSINESS JUDGMENT

You may not return a verdict for the plaintiff just because you might disagree with Werner's business decision, or believe it to have been harsh, without good reason, or due to honest mistake.

An employer has the right to make its own subjective personnel decisions on any basis, good or bad, so long as it is not discriminatory.

INSTRUCTION #15: ACTUAL DAMAGES

If you find for the plaintiff on its claims under either Instruction #9 or Instruction #10, and you find against Werner on its affirmative defense under Instruction #11, then you must award the plaintiff such sum as you find will fairly and justly compensate Victor Robinson for any damages you find he sustained as a direct result of Werner's failure to hire or accommodate him.

Specifically, you must determine the amount of damages Mr. Robinson sustained, in the form of emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life.

You must not consider any financial losses Mr. Robinson might have sustained, such as lost wages—those losses, if any, will be separately addressed by the Court, and you need not worry about them.

If you find in favor of the plaintiff but do not find that Mr. Robinson's damages have monetary value, then you must award a verdict for the plaintiff in the nominal amount of one dollar (\$1.00).

Remember, throughout your deliberations, you must not engage in any speculation, guess, or conjecture and you must not award damages under this Instruction by way of punishment or through sympathy.

INSTRUCTION #16: PUNITIVE DAMAGES

In addition to the actual damages mentioned in Instruction #15, the law permits you under certain circumstances to award punitive damages.

If you find for the plaintiff on its claims under either Instruction #9 or Instruction #10, and you find against Werner on its affirmative defense under Instruction #11, then you must decide whether Werner acted with malice or reckless indifference to Mr. Robinson's right not to be discriminated against on the basis of a disability.

Werner acted with malice or reckless indifference if the plaintiff proves by the greater weight of the evidence that Werner (through its managers or supervisors) knew that its failure to hire Mr. Robinson was in violation of the law prohibiting disability discrimination, or they acted with reckless disregard of that law. However, you may not award punitive damages if it has been proved that Werner made a good-faith effort to comply with the law prohibiting disability discrimination.

Whether to award punitive damages

If it has been proved that Werner acted with malice or reckless indifference to Mr. Robinson's rights, and did not make a good-faith effort to comply with the law, then—in addition to any other damages to which you find Mr. Robinson entitled—you may (but are not required to) award the plaintiff an additional amount as punitive damages, to punish Werner for engaging in such misconduct and deter Werner and others from engaging in such misconduct in the future. You should presume that Mr. Robinson has been made whole for his injuries by any actual damages awarded under Instruction #15.

In determining whether to award punitive damages, you should consider whether Werner's conduct was reprehensible. In this regard, you may consider whether:

- Werner's conduct that harmed Mr. Robinson also caused harm or posed a risk of harm to others;
- There was any repetition of the wrongful conduct and past conduct of the sort that harmed Mr. Robinson; and
- There was deceit, intentional malice, or reckless disregard for human health or safety.

Determining the amount of punitive damages

If you decide to award punitive damages, you should consider the following in deciding the amount of punitive damages to award:

- How much harm Werner's wrongful conduct caused Mr. Robinson; and
- What amount of punitive damages, in addition to the other damages already awarded, is needed, considering Werner's financial condition, to punish Werner for its wrongful conduct toward Mr. Robinson and to deter Werner and others from similar wrongful conduct in the future.

The amount of any punitive damages award should bear a reasonable relationship to the harm caused to Mr. Robinson. You may not consider harm to others in deciding the *amount* of punitive damages to award.

INSTRUCTION #17: VERDICT DETERMINED BY CHANCE NOT PERMITTED

The law forbids you to return a verdict determined by chance. You may not, for instance, agree in advance that each juror will state an amount to be awarded in damages, that all of those amounts will be added together, that the total will be divided by the number of jurors, and that the result will be returned as the jury's verdict. A verdict determined by chance is invalid.

**INSTRUCTION #18: ELECTION OF FOREPERSON AND RULES FOR
DELIBERATION**

In conducting your deliberations and returning your verdict, there are certain rules you must follow. I shall list those rules for you now.

First, when you go to the jury room, you must select one of your members as your foreperson. That person will preside over your discussions and speak for you here in court.

Second, it is your duty, as jurors, to discuss this case with one another in the jury room. You should try to reach agreement if you can do so without violence to individual judgment, because your verdict must be unanimous. Each of you must make your own conscientious decision, but only after you have considered all the evidence, discussed it fully with your fellow jurors, and listened to the views of your fellow jurors. Do not be afraid to change your opinions if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right, or simply to reach a verdict.

Third, if you need to communicate with me during your deliberations, you may send a note to me through the courtroom deputy, signed by one or more jurors. I will respond as soon as possible either in writing or orally in open court. Remember that you should not tell anyone, including me, how your votes stand numerically.

Fourth, your verdict must be based solely on the evidence and on the law which I have given to you in my instructions. The verdict, whether for the plaintiff or the defendants, must be unanimous. Nothing I have said or done is intended to suggest what your verdict should be—that is entirely for you to decide.

Finally, the verdict form is simply the written notice of the decision that you reach in this case. You will take this form to the jury room, and when each of you have agreed on the verdict, your foreperson will fill in each page of the form, sign and date it, and advise the courtroom deputy that you are ready to return to the courtroom. If you do not agree upon a verdict by 5:00 p.m. on any given day, you may separate and return for deliberation at 8:30 a.m. on the next business day. If you desire to deliberate after 5:00 p.m., you may do so but please notify the courtroom deputy if that is your intention.

Please be admonished that if you separate at any time during your deliberations, you are, during such separation, not to talk to anyone about this case or to talk among yourselves about this case. All your deliberations should

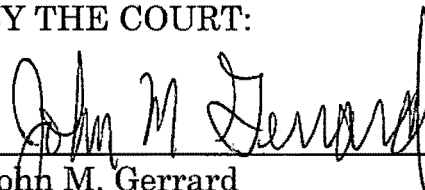
be conducted as a group in the confines of the jury room. Please also remember and follow all of the other admonitions I have given you throughout this trial for your conduct during recesses. All such instructions also continue to apply during any separations which may occur after you commence deliberations.

Thank you for your service.

Dated this 1st day of September, 2023.

Submitted at 10:36 o'clock A.m.

BY THE COURT:



John M. Gerrard
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff,

vs.

DRIVERS MANAGEMENT, LLC,
and WERNER ENTERPRISES, INC.

Defendants.

8:18-CV-462

TENTATIVE FINDINGS

This matter is before the Court on anticipated evidentiary issues regarding the upcoming bench trial. The defendants, collectively "Werner," orally moved in limine to present evidence related to Victor Robinson's employment and personnel records. The Court previously excluded those records (during the jury trial) because they were only relevant to backpay, an issue not before the jury. See [filing 303 at 6-7](#). The plaintiff seeks to exclude those records from the Court's consideration of backpay because Werner did not timely disclose them. See [filing 290](#). And for its part, Werner additionally seeks to exclude the plaintiff's expert calculations for damages allegedly incurred after 2019 because the plaintiff did not disclose them.

Rule 26(a)(1)(A) requires parties to disclose "all documents . . . that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses," and to disclose "a computation of each category of damages claimed by the disclosing party." These disclosures must be supplemented "in a timely manner" if a party learns that the disclosure is incomplete or incorrect; *i.e.*, if the party obtains additional documents or amends its damages calculations. See [Fed. R. Civ. P. 26\(e\)](#). A party is not

allowed to use untimely disclosed evidence at trial unless the failure to timely disclose "was substantially justified or harmless." [Fed. R. Civ. P. 37\(c\)\(1\)](#); *see also* [Trost v. Trek Bicycle Corp.](#), 162 F.3d 1004, 1008 (8th Cir. 1998).

The Court has wide discretion in creating a remedy for a party's failure to comply with Rule 26(a) and (e), and will consider the reasons for noncompliance, the surprise and prejudice to the opposing party, the extent to which the evidence would disrupt the order and efficiency of trial, and the importance of the evidence. [Wegener v. Johnson](#), 527 F.3d 687, 692 (8th Cir. 2008). Excluding evidence "is a harsh penalty and should be used sparingly." *Id.* (quoting [ELCA Enters. v. Sisco Equip. Rental & Sales](#), 53 F.3d 186, 190 (8th Cir. 1995)).

Robinson Employment Records

Werner identified employment records related to Robinson on July 27, 2023, roughly one month before the jury trial. The plaintiff had no record of receiving the documents, and Werner provided the documents to them at that point. *See* [filing 290 at 1](#). Werner argues its failure to provide the documents earlier was a harmless oversight. *See* [filing 307 at 4](#).

Considering the *Wegener* factors, Werner's failure to provide the documents is substantially justified and harmless. The Court believes Werner when it asserts its failure to timely disclose was a clerical oversight. The plaintiff cannot claim surprise or prejudice when it knew about Robinson's performance, and Werner simply has evidence of that performance. The evidence is relevant to the Court's determination of whether and in what amount Robinson is entitled to backpay, and it would not disrupt the bench trial to admit the employment records.

Accordingly, the Court tentatively intends to admit that evidence. But the Court will make a final ruling at trial.

Expert Calculations After 2019

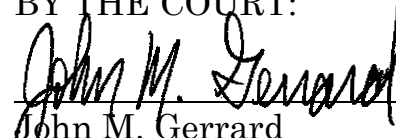
Werner appears to assert that it *never* obtained the plaintiff's expert calculations for damages claimed after 2019. [Filing 328 at 2](#). The expert's report contains backpay calculations through 2019, *see* [filing 327-2](#), and the plaintiff has indicated its expert will "testify to an updated calculation through May 14, 2020," [filing 327 at 3](#). It's not clear that a written record of these updated calculations exists. *See* [filing 327 at 3](#).

It is the plaintiff's burden to show that its failure to supplement its expert calculations was either substantially justified or harmless. *Vanderberg v. Petco Animal Supp. Stores, Inc.*, 906 F.3d 698, 704 (8th Cir. 2018). That said, Werner has not proffered any theory, and the Court cannot envision one, which would show how the failure to disclose the updated calculations harmed Werner. Werner merely argues that the evidence should be excluded because the plaintiff didn't follow the rules. *See* [filing 328 at 2](#). It's unclear how Werner would or could have prepared for the upcoming bench trial differently had an updated expert report been available. The plaintiff's expert will presumably employ the same methods of calculating damages as in the initially disclosed report, so any of Werner's issues with the expert's "faulty assumptions" will equally apply to the supplemental calculations. *See* [filing 327 at 3](#); [filing 327-2 at 2](#); [filing 328 at 1](#). But the Court's final ruling will be made based on whether that presumption is borne out at trial.

IT IS ORDERED: The Court will take the parties' motions under advisement and resolve them at trial.

Dated this 2nd day of October, 2023.

BY THE COURT:



John M. Gerrard
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff,

vs.

DRIVERS MANAGEMENT, LLC,
and WERNER ENTERPRISES, INC.

Defendants.

8:18-CV-462

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The plaintiff, the Equal Employment Opportunity Commission (EEOC), sued the defendants, Drivers Management, LLC and Werner Enterprises, Inc. (collectively "Werner"), on behalf of Victor Robinson. In September 2023, a jury returned a verdict in favor of the plaintiff, awarding \$75,000 for Robinson's pain and suffering and \$36,000,000 in punitive damages.¹ [Filing 323 at 2.](#)

Under [42 U.S.C. § 1981a\(b\)\(2\)](#), an award of backpay in this type of case is equitable relief, though monetary in nature. See [Pedigo v. P.A.M. Transp., Inc.](#), 60 F.3d 1300, 1303 (8th Cir. 1995); [Maitland v. Univ. of Minn.](#), 155 F.3d 1013, 1018 (8th Cir. 1998). Because a jury determined that Werner discriminated against Robinson on the basis of his disability, the Court must determine whether and in what amount Robinson is entitled to backpay. See [Arroyo v. Volvo Grp. N.A., LLC](#), No. 12-cv-6859, 2017 WL 2985649, at *4 (N.D. Ill. July 13, 2017); [EEOC v. Wal-Mart Stores, Inc.](#), No. 17-cv-739, 2020 WL 1527324, at *1-2 (W.D. Wisc. March 31, 2020). To make this determination,

¹ Werner moved to reduce the judgment for compensatory and punitive damages to the statutory cap. [Filing 337](#). The motion will be granted. See [42 U.S.C. § 1981a\(b\)\(3\)\(D\)](#).

and to determine the nature and scope of any other equitable relief under [42 U.S.C. § 12117\(a\)](#) (incorporating [42 U.S.C. § 2000e-5\(g\)](#)), this Court held a bench trial on October 4, 2023.

I. FINDINGS OF FACT

Having presided over the jury trial and subsequent bench trial, the Court is quite familiar with the facts. To the extent those facts remain disputed, the Court finds the following narrative to have been proven by a preponderance of the evidence.

Victor Robinson applied to work for Werner in January 2016. He is deaf, with a commercial driver's license and an exemption from the Federal Motor Carrier Safety Administration (FMCSA) physical qualification standards concerning hearing for interstate drivers. *See* [80 Fed. Reg. 18924-01 \(Apr. 8, 2015\)](#). Werner did not hire Robinson. The EEOC sued Werner, alleging that Werner discriminated against Robinson on the basis of his deafness.

Werner's position was that it could not safely train inexperienced deaf drivers like Robinson. *E.g.*, [filing 322 at 6, 12](#); [filing 345, passim](#). Werner specifically argued that Robinson, and other FMCSA hearing exemption holders, could not complete the trainer-observed over-the-road component of Werner's training program. Under this program, Werner required drivers with less than six months' trucking experience to drive alongside a trainer on a real over-the-road trucking route. Werner claimed that it believed there was no way a trainer could safely communicate with a deaf driver while the two were driving together. Despite the federal government's approval, and despite evidence of other trucking companies' ability to train deaf drivers (*e.g.*, [filing 344 at 83](#)), Werner argued that it could not hire inexperienced deaf drivers because of safety concerns.

A jury rejected Werner's position and determined that Robinson was qualified to perform the job to which he applied, he could have safely performed the essential functions of the job with a reasonable accommodation, and Werner's refusal to hire Robinson was not based on business necessity. See [filing 322](#); [filing 323](#). The Court determined, because a jury found Robinson was qualified and could have performed the essential functions of the job with a reasonable accommodation, the plaintiff had shown as a matter of law that Werner failed to hire Robinson because of his disability. [Filing 316 at 5](#).

The jury also determined that Werner acted with malice or reckless indifference towards Robinson's right not to be discriminated against on the basis of his deafness. And, the jury determined that Werner did not act in good faith when it rejected Robinson. Pursuant to those factual findings, the jury awarded damages intended to punish Werner for its misconduct.

Robinson's Over-the-Road Trucking Jobs

Robinson learned that Werner would not hire him around February 15, 2016. Between that day and May 14, 2020, when he no longer possessed an FMCSA hearing exemption, Robinson worked at the following companies as a commercial truck driver:

<i>Company</i>	<i>Timeline</i>	<i>Reason for Leaving</i>
Covenant	Mar. 2016 – Sept. 2016	Wanted more compensation (quit)
Jacobson Transport (XPO)	Sept. 2016 – Oct. 2016	Wrong type of truck (terminated)
U.S. Xpress, Inc.	Oct. 2016 – Apr. 2017	"Cruel" customers (quit)
J.B. Hunt	May 2017 – Jan. 2018	Unethical, long hours (quit)
Marten Transport	Jan. 2018 – Aug. 2018	Accident (terminated)
Stan Koch Trucking	Sept. 2018 – Sept. 2019	Accepted different job (quit)

Western Express	Oct. 2019 – May 2020	Medical reasons (quit)
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Robinson's job at each of these companies is comparable to the position he applied to at Werner. One distinction is that Robinson would have been an "over-the-road" driver had he been hired by Werner, meaning he would have spent days or weeks away from home. But when Robinson worked for Marten and J.B. Hunt,² he was a "local" driver, meaning he was home every night.

The plaintiff presented an expert, economist Dr. Nathan Adams, to calculate Robinson's backpay. In his expert report, trial exhibit 86, Adams utilized information from Werner to calculate the average pay an employee in the position to which Robinson applied would have earned between February 2016 and December 2019. Adams extrapolated the salary data from Werner to calculate what an employee in that position would have earned between January and May 2020 and presented those numbers for the first time at the bench trial. Adams also calculated the value of the health insurance and 401(k) benefits Robinson would have been expected to take advantage of had he been employed by Werner. Because Adams did not have the exact hire dates for Robinson's other employment, his calculations assume that Robinson was employed for the entire month. During months where Robinson held two jobs, Adams assumed he was employed half of the month in both jobs. This likely led to an overestimation in what Robinson earned at these jobs. *See ex. 86 at 7.* Adams' relevant calculations from his report are as follows:

² Robinson testified that he left J.B. Hunt because had he actually driven home every night, he would have driven more hours than legally allowed, so it was not truly a local driver job, and he found the company to be unethical for this reason.

Table 2: **CONFIDENTIAL** Estimated annual compensation from Werner

Year	Mean annual salary	Benefits			Total
		401(k)	Stock	Medical	
<i>Panel A: Mr. Robinson</i>					
2016	\$37,382.43	\$258.25	\$0	\$6,252.75	\$43,893.44
2017	\$48,932.35	\$733.99	\$0	\$9,535.56	\$59,201.89
2018	\$51,727.13	\$775.91	\$0	\$7,464.48	\$59,967.52
2019	\$53,941.47	\$809.12	\$0	\$5,505.96	\$60,256.55

Table 3: Mr. Robinson's post-application earnings

Company	Wages	Medical Benefits	Total
<i>Panel A: 2016</i>			
Covenant	\$17,222.17	\$3,588.82	\$20,810.99
XPO	\$675	\$0	\$675
US Xpress, Inc.	\$9,975.00	\$0	\$9,975.00
Total	\$27,872.95	\$3,588.82	\$31,461.77
<i>Panel B: 2017</i>			
US Xpress, Inc.	\$17,887.00	\$3,204.67	\$21,091.67
J.B. Hunt	\$33,336.00	\$2,440.00	\$35,776.00
Total	\$51,223.00	\$5,644.67	\$56,867.67
<i>Panel C: 2018</i>			
J.B. Hunt	\$1,887.00	\$399.00	\$2,286.00
Marten	\$21,390.05	\$4,550.61	\$25,940.66
Stan Koch	\$10,824.50	\$0	\$10,824.50
Total	\$34,101.55	\$4,949.61	\$39,051.16
<i>Panel D: 2019</i>			
Stan Koch	\$31,998.76	\$6,211.15	\$38,209.91
Western Express	\$3,855.06	\$2,149.47	\$6,004.53
Total	\$35,853.82	\$8,360.62	\$44,214.44

Year	Werner Wages+Benefits	Mitigation Wages+Benefits	Subtotal	Interest	Total
(1)	(2)	(3)	(4)	(5)	(6)
<i>Panel A: Mr. Robinson</i>					
Tax Penalty	—	—	\$606.00	\$218.25	\$824.25
2016	\$43,893.44	\$31,461.77	\$12,431.67	\$1,856.26	\$14,287.93
2017	\$59,201.89	\$56,867.67	\$2,334.23	\$245.36	\$2,579.58
2018	\$59,967.52	\$39,051.16	\$20,916.36	\$1,150.40	\$22,066.76
2019	\$60,256.55	\$44,214.44	\$16,042.11	\$0	\$16,042.11
Total	\$223,319.41	\$171,595.03	\$52,330.37	\$3,470.26	\$55,800.63

The "tax penalty" line item represents losses that Robinson allegedly incurred when he made early withdrawals from his retirement account to support his family while he was unemployed (including interest on those losses). Adams' report indicates that he calculated prejudgment interest by using the IRS interest rates used for the underpayment of taxes. The plaintiff asserts that Robinson is owed \$81,100 in backpay for the period between February 2016 and May 2020, inclusive of prejudgment interest and exclusive of compensation Robinson earned at his other trucking jobs. [Filing 349 at 11](#).

II. CONCLUSIONS OF LAW

1. BACKPAY

Claimants who prove employment discrimination are presumptively entitled to backpay. [Stragapede v. City of Evanston, Ill.](#), 865 F.3d 861, 868 (7th Cir. 2017); *see also* [Albarmarle Paper Co. v. Moody](#), 422 U.S. 405, 421-22 (1975). To calculate backpay, the Court will:

- Determine the amount of any wages and fringe benefits the plaintiff proved Robinson would have earned throughout the date of the verdict, or some other cut-off date;
- Subtract the amount of earnings and benefits that Robinson received from other employment;
- Reduce the damages by the amount Werner proved Robinson could have avoided by taking advantage of an opportunity reasonably available to him; and
- Consider any other reductions justified by independent reasons proven by Werner as to why Robinson would not have been employed by Werner before the verdict.

E.g., Hartley v. Dillard's, Inc., 310 F.3d 1054, 1061-62 (8th Cir. 2002); *Cleverly v. W. Elec. Co.*, 450 F. Supp. 507, 511 (W.D. Mo. 1978), *aff'd*, 594 F.2d 638 (8th Cir. 1979); *see Arroyo*, 2017 WL 2985649, at *4 (collecting cases); *Wal-Mart Stores*, 2020 WL 1527324, at *1-2.

Cut-Off Date

The cut-off date asserted by the plaintiff is May 14, 2020, when Robinson stopped working as a commercial truck driver and no longer held an FMCSA hearing exemption. *See filing 349 at 13*. Werner argues that the Court should limit Robinson's backpay through August 2016, February 2017, or August 2018, based on Robinson's performance at other trucking companies and based on Robinson's choice to quit various jobs for personal reasons. *Filing 350 at 3*.

In the interests of equity, based on Werner's evidence of the high turnover rate in the industry, *see filing 350 at 9*, and Robinson's own work history, the Court will limit the backpay period to the end of 2018. The preponderance of the evidence indicates that Robinson would likely not have been employed by Werner beyond that date.³ *See E.E.O.C. v. Delight Wholesale Co.*, 973 F.2d 664, 670-71 (8th Cir. 1992).

Calculation

According to the plaintiff's calculations, had Robinson worked at Werner from February 2016 to December 2018, he would have earned \$163,062.85, inclusive of wages and benefits. Robinson actually earned \$127,380.60, inclusive of wages and benefits, during that time. Ex. 86 at 15. The backpay award, then, is \$163,062.85 less \$127,380.60, which equals \$35,682.25.

Robinson also seeks repayment for losses he incurred when he made early withdrawals from his retirement account after Werner did not hire him.

³ Because the Court is cutting off the backpay period, it need not address Werner's argument that the plaintiff failed to disclose certain calculations between January and May 2020.

But Robinson did not prove by a preponderance of the evidence that he made those withdrawals because Werner did not hire him. Robinson found a comparable job and he was paid on March 11, 2016. The plaintiff did not provide any evidence—bank statements or otherwise—showing when Robinson made the alleged withdrawals. See [filing 348 at 62](#). The backpay award will not include any losses associated with the "tax penalty" in Adams' report.

Interest

The Court must also determine whether to include prejudgment interest in the plaintiff's backpay award. The award of prejudgment interest, in the absence of statutory directives, rests in the discretion of the district courts. [Turn Key Gaming, Inc. v. Oglala Sioux Tribe](#), 313 F.3d 1087, 1093 (8th Cir. 2002) (quoting [Cargill, Inc. v. Taylor Towing Serv., Inc.](#), 642 F.2d 239 (8th Cir. 1981)). Prejudgment interest "is part of full compensation" under the ADA, and is "necessary to carry out the federal policies of compensation and deterrence." [Williamson v. Handy Button Mach. Co.](#), 817 F.2d 1290, 1297 (7th Cir. 1987) (collecting cases).

Werner argues that the plaintiff waived the right to collect *any* prejudgment interest because it failed to include this request in the final pretrial conference order, or any other pleading. [Filing 350 at 11](#) (citing [Crabar/GBF, Inc. v. Wright](#), No. 8:16-cv-537, 2023 WL 6125519, at *4 (D. Neb. Sept. 19, 2023)). The Court is not convinced.

The Supreme Court has allowed parties to request prejudgment interest for the first time even in a postjudgment motion. [Osterneck v. Ernst & Whinney](#), 489 U.S. 169, 175 (1989); see also [Leonard v. S.W. Bell Corp. Disability Income Plan](#), 408 F.3d 528, 533 (8th Cir. 2005) (allowing a party to request prejudgment interest on remand); cf. [Travelers Prop. Cas. Ins. Co. of](#)

Am. v. Nat'l Union Ins. Co. of Pittsburgh, Pa., 735 F.3d 993, 1008 (8th Cir. 2013) ("[A] party's failure to request postjudgment interest is not fatal to a prevailing party's entitlement to such interest"). This makes sense, because unlike categories of damages like lost profits—a fact issue determined by a jury—prejudgment interest is part of "full compensation" determined by the Court and awarded solely in the Court's discretion. See *West Virginia v. United States*, 479 U.S. 305, 310 (1987); *Turn Key Gaming*, 313 F.3d at 1093; cf. *Crabar*, 2023 WL 6125519, at *4 (citing Fed. R. Civ. P. 16 committee notes on 1983 amendment (requiring counsel to identify "factual issues worthy of trial" by including those issues in a pretrial conference order)).

Based on the foregoing, the plaintiff is not even required to *disclose* prejudgment interest calculations, contrary to Werner's assertions. The Court, not the plaintiff, has the responsibility to determine an appropriate interest rate and to calculate interest. See *Leonard*, 408 F.3d at 533; *Sanders v. Union Pac. R.R. Co.*, No. 4:20-cv-3023, 2022 WL 3446132, at *2-3 (D. Neb. Aug. 17, 2022); *Turn Key Gaming*, 313 F.3d at 1092-93; *Arroyo*, 2017 WL 2985649, at *10; *Miller v. Bd. of Regents of Univ. of Minn.*, 402 F. Supp. 3d 568, 591 (D. Minn. 2019); *Ohio River Co. v. Peavey Co.*, 731 F.2d 547, 549 (8th Cir. 1984) ("We have approved different approaches to deriving a rate of interest which will make the plaintiff whole," including the average prime interest rate during the relevant period, and the prevailing rate of interest (citations omitted)).

The Court has now determined the appropriate backpay award. The plaintiff's expert's report provides little guidance in how interest was calculated. See ex. 86 at 15. Recognizing the need for additional evidence, the Court will permit the plaintiff to request a specific prejudgment interest amount in a Rule 59(e) motion to amend the judgment. See *Osterneck*, 489 U.S. at 175; *Leonard*, 408 F.3d at 533; *Sanders*, 2022 WL 3446132, at *1.

The Court is inclined to award prejudgment interest based on the total backpay award, including benefits and wages.⁴ See *Doyne v. Union Elec. Co.*, 755 F. Supp. 866, 869 (E.D. Mo. 1991) (citing *Behlar v. Smith*, 719 F.2d 950, 954 (8th Cir. 1983), *cert. denied*, *Univ. of Ark. Bd. of Tr. v. Greer*, 466 U.S. 958 (1984)); *Sanders*, 2022 WL 3446132, at *2; *but see Arroyo*, 2017 WL 2985649, at *10-11. The plaintiff is encouraged to review the cases cited by the Court, provide *detailed* calculations for prejudgment interest to be added to the \$35,682.25 backpay award, and explain why the chosen rate is suitable to make Robinson whole. Werner may contest the plaintiff's numbers and provide its own calculations. In the interests of efficiency, knowing the Court will award prejudgment interest, the parties *are encouraged* to stipulate to an appropriate interest award.

2. OTHER EQUITABLE RELIEF

If a court finds that a defendant "has intentionally engaged" in disability discrimination, the Court, in its discretion, may provide any appropriate equitable relief. §§ 2000e-5(g), 12117(a); *see also Wedow v. City of Kansas City*, 442 F.3d 661, 676 (8th Cir. 2006) (citing *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 764 (1976)); *Layton v. Elder*, 143 F.3d 469, 472 (8th Cir. 1998). Once a party has demonstrated success on the merits, the Court must balance three factors to determine whether injunctive relief is merited: (1) the threat of irreparable harm; (2) the harm suffered by the nonmoving party; and (3) the public interest. *E.g.*, *Layton*, 143 F.3d at 472; *see Dataphase Systems, Inc. v. C.L. Systems, Inc.*, 640 F.2d 109, 113 (8th Cir. 1981).

⁴ But, since the plaintiff has already met the statutory cap for compensatory damages, no interest may be awarded for those damages. *See* § 1981a(b)(4).

The plaintiff has succeeded on the merits. Based on the above factors, injunctive relief is appropriate in this case. The evidence adduced at trial and the jury's verdict indicate that Werner intentionally refused to hire inexperienced deaf drivers, and has continued to discriminate against FMCSA hearing exemption holders on the basis of their disability, at least as of Robinson's trial. However, the plaintiff's proposed injunctive relief does little more than order Werner to obey the law, and the Court does not find such an order proper in this case. See [filing 349 at 2](#); *Powell v. Noble*, 36 F. Supp. 3d 818, 836-37 (S.D. Iowa 2014) ("obey the law" injunctions are "routinely found inappropriate under Fed. R. Civ. P. 65(d)" (citing *Calvin Klein Cosmetics Corp. v. Parfums de Coeur, Ltd.*, 824 F.2d 665, 669 (8th Cir. 1987))).

The scope of injunctive relief against continued discrimination should be designed to prevent similar misconduct, and must be related to the violation with which the defendants were originally charged. *EEOC v. HBE Corp.*, 135 F.3d 543, 557-58 (8th Cir. 1998); *EEOC v. AutoZone, Inc.*, 707 F.3d 824, 842-43 (7th Cir. 2013) (quoting *Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 767 (4th Cir. 1998)). "[U]pon a finding of any intentional employment discrimination, a district court possesses broad discretion to craft an injunction that will ensure the employer's compliance with the law." *EEOC v. Frank's Nursery & Crafts, Inc.*, 177 F.3d 448, 468 (6th Cir. 1999); §§ 2000e-5(g), 12117(a). And the plaintiff may obtain general injunctive relief to correct discrimination uncovered during an investigation of the charge of just one individual. *Frank's Nursery*, 177 F.3d at 468-69 (collecting cases); see also *HBE Corp.*, 135 F.3d at 557.

A jury rejected Werner's argument that it was concerned about safety. Instead, the jury awarded a multi-million dollar punitive damages award, intending to punish Werner for its malice or reckless indifference towards the

right of Robinson and other deaf individuals not to be discriminated against. Werner's repeated assertions that it would not hire inexperienced deaf drivers, despite knowing the law and complying with federal antidiscrimination laws in other respects, constitutes intentional discrimination. *E.g.*, [filing 345](#), *passim*; [filing 346](#), *passim*; [filing 316](#). But the statute caps punitive damages at \$300,000, not even *one percent* of the jury's intended award—an amount which will do little to deter Werner from future discriminatory hiring decisions. Werner discriminated against Robinson nearly eight years ago, and this lawsuit has dragged on for over five years. The EEOC was unable to identify other deaf applicants who were not hired by Werner because Werner, it says, does not keep that kind of information.

Injunctive relief should be targeted at assisting the EEOC in identifying discrimination by Werner. In a typical disability discrimination case, the EEOC has to wait for a victim of discrimination to come to it. But if Werner is required to report any deaf applicants and the disposition of their application to the EEOC, the EEOC can proactively find those applicants and investigate Werner's hiring decision accordingly.

It's clear, from the different outcomes of this case and the companion *Dueschle* case (no. 8:16-cv-329), that employment decisions rest on complicated factual issues. Litigating those facts through contempt orders in an injunction is impracticable. Werner is entitled to defend its employment decisions on a case-by-case basis, with the full due process afforded by the ADA and Federal Rules of Civil Procedure. But based on the jury's verdict, Werner has not acted in good faith and did not comply with antidiscrimination laws when it intentionally discriminated against Robinson on the basis of his deafness.

For these reasons, the Court finds that injunctive relief imposing semi-annual recording and reporting requirements on Werner will serve the

interests of equity and the public. Such a requirement is in line with injunctive relief premised on employment discrimination in this jurisdiction. See *HBE Corp.*, 135 F.3d at 557-58. Balancing the harms to each party, these requirements will not harm Werner so long as Werner complies with federal law. The reports may even enable Werner to avoid future lawsuits by demonstrating its good faith efforts to comply with the ADA.

Werner (including any subsidiaries) will be expected to keep a record of any deaf truck driving applicants, and will be expected to report those records to the EEOC. Those records shall include, at a minimum:

- The name and available contact information for any hearing-impaired applicant for an over-the-road truck driving position.
- The date of that application.
- Whether or not the applicant was hired.
- The dates on which the employment decision was made and communicated to the applicant.
- The basis for declining to hire any of the above-described applicants.
- Whether any applicant hired remains employed with Werner six months after being hired, and if not, the reason for the separation.

Werner shall provide those records to the EEOC through the EEOC's counsel in this case or other office of the EEOC's choosing, no less frequently than every six months, starting from the date of this order. Werner shall, upon compliance with that reporting requirement, file a certificate of service with this Court. Werner will bear all the costs associated with these recording and reporting requirements. The requirements will be imposed for a period of three years, after which the Court will convene a hearing to determine whether Werner has

complied with the Court's order, and whether the injunction should be modified, extended, or terminated.

Accordingly,

IT IS ORDERED:

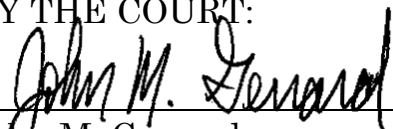
1. The Court finds that the defendants intentionally engaged in discrimination when they failed to hire Robinson on the basis of his disability in violation of [42 U.S.C. § 12112\(a\)](#).
2. The Court finds that Victor Robinson is entitled to backpay in the amount of \$35,682.25 pursuant to [42 U.S.C. § 12117](#) (incorporating [§ 2000e-5\(g\)](#)).
3. The Court finds that injunctive recording and reporting requirements are warranted pursuant to [§ 2000e-5\(g\)](#).
4. The plaintiff shall request prejudgment interest in a motion to alter or amend the judgment pursuant to [Fed. R. Civ. P. 59\(e\)](#) no later than 28 days after the entry of judgment.
5. The defendants' motion to apply the statutory maximum for compensatory and punitive damages ([filing 337](#)) is granted.
6. The Clerk of the Court shall set a status report deadline for June 10, 2024, with the following docket text: Check for certificate of service for records reporting.

7. The Clerk of the Court shall set a case management deadline for January 10, 2027, with the following docket text:
Schedule hearing to evaluate injunction.

8. A separate judgment will be entered.

Dated this 10th day of January, 2024.

BY THE COURT:



John M. Gerrard
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff,

vs.

DRIVERS MANAGEMENT, LLC,
and WERNER ENTERPRISES, INC.

Defendants.

8:18-CV-462

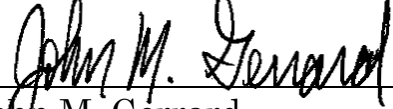
JUDGMENT

Pursuant to the jury's verdict ([filing 323](#)) and the accompanying findings of fact and conclusions of law, judgment is entered for the plaintiff and against the defendants in the amount of \$335,682.25.

For a period of three years from the date of this judgment, defendant Werner Enterprises shall report in writing to the plaintiff, no less frequently than every six months, the name and available contact information for any hearing-impaired applicant for an over-the-road truck driving position, the date of that application, whether or not the applicant was hired, the dates on which the employment decision was made and communicated to the applicant, the basis for declining to hire any of the above-described applicants, and whether any applicant hired remains employed with Werner six months after being hired, and if not, the reason for the separation. The defendants shall file proof of such reports with the Court.

Dated this 10th day of January, 2024.

BY THE COURT:



John M. Gerrard
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff,

vs.

DRIVERS MANAGEMENT, LLC,
and WERNER ENTERPRISES, INC.

Defendants.

8:18-CV-462

MEMORANDUM AND ORDER

This matter is before the Court on the parties' post-trial motions. The defendants, Drivers Management, LLC and Werner Enterprises, Inc. (collectively, Werner), moved for a renewed judgment as a matter of law and for a new trial or to alter or amend the judgment. [Filing 355](#). Werner has also requested this Court's review of costs taxed by the Clerk of the Court ([filing 369](#)). [Filing 372](#). And the plaintiff, the Equal Employment Opportunity Commission, moved to amend the judgment to include prejudgment interest. [Filing 358](#).

I. BACKGROUND

Victor Robinson applied to work for Werner in January 2016 as an over-the-road truck driver. Trial ex. 2. He is deaf, and, at the time of his application, he had a commercial driver's license (CDL) and an exemption from the Federal Motor Carrier Safety Administration (FMCSA) physical qualification standards concerning hearing for interstate drivers. *See* [80 Fed. Reg. 18924-01 \(Apr. 8, 2015\)](#). Robinson attended the Roadmaster driving school in

Indianapolis to obtain his CDL. [Filing 344 at 102](#). Roadmaster is a wholly-owned subsidiary of Werner. [Filing 345 at 41](#).

Werner did not hire Robinson. The EEOC sued Werner, alleging that Werner discriminated against Robinson on the basis of his deafness in contravention of the Americans with Disabilities Act. Werner's position was that it did not hire Robinson because it believed it could not safely train inexperienced deaf drivers, and no reasonable accommodation would enable it to do so. *E.g.*, [filing 322 at 6, 12](#); [filing 345 passim](#); *see also* [filing 316 at 3-4](#).

At trial, and throughout the litigation, Werner argued that Robinson, and other FMCSA hearing exemption holders, could not safely complete the trainer-observed over-the-road component of Werner's training program, now called the "placement driver program." Under the placement driver program, Werner required drivers with less than six months' professional trucking experience to drive alongside a trainer on a real over-the-road trucking route. Werner claimed that it believed there was no way a trainer could safely communicate with a deaf driver while driving together, even with an accommodation.

The jury determined that Robinson was qualified to perform the job to which he applied, he could have safely performed the essential functions of the job with a reasonable accommodation, and Werner's refusal to hire Robinson was not based on business necessity. *See* [filing 322](#); [filing 323](#). The Court determined, because a jury found that Robinson was qualified and could have performed the essential functions of the job with a reasonable accommodation, the plaintiff had shown as a matter of law that Werner failed to hire Robinson because of his disability. [Filing 316 at 5](#).

The jury also determined that Werner acted with malice or reckless indifference towards Robinson's right not to be discriminated against on the

basis of his deafness. And, the jury determined that Werner did not act in good faith when it rejected Robinson. Pursuant to those factual findings, the jury awarded damages intended to punish Werner for its misconduct. [Filing 323](#).

The verdict exceeded the statutory cap for compensatory damages. [Filing 323](#); 42 U.S.C. § 1981a(b)(3)(D). After a bench trial to determine any equitable relief, the Court awarded the statutory cap and an additional \$35,682.25 in backpay. [Filing 354](#). The Court also enjoined Werner to provide biannual reports to the EEOC regarding hearing-impaired job applicants. *Id.*

II. WERNER'S RULE 50 AND RULE 59 MOTION

Werner argues that the Court erred in the following respects, warranting a new trial under Rule 59:

- Granting a partial directed verdict in favor of the EEOC,
- Dismissing some of Werner's affirmative defenses at summary judgment,
- Admitting evidence of "stray remarks" and excluding evidence of Robinson's job performance after Werner failed to hire him, and
- Submitting the issue of punitive damages to the jury.

Werner also requests judgment as a matter of law under Rule 50 because Robinson was not a qualified individual and the jury did not have a legally sufficient basis to award punitive damages. [Filing 356 at 19](#). And Werner argues that the Court should eliminate or narrow the injunctive relief awarded. [Filing 356 at 25](#).

1. STANDARDS OF REVIEW

(a) Rule 50

When considering a motion for judgment as a matter of law, a court must determine whether or not the evidence was sufficient to create an issue of fact

for the jury. *Lane v. Chowning*, 610 F.2d 1385, 1388 (8th Cir. 1979). The Court will grant a motion for judgment as a matter of law when all the evidence points one way and is susceptible of no reasonable inferences sustaining the position of the nonmoving party. *Ehrhardt v. Penn. Mut. Life Ins. Co.*, 21 F.3d 266, 269 (8th Cir. 1994). In considering the motion, the Court views the record in the light most favorable to the prevailing party. *Wash Solutions, Inc. v. PDQ Mfg., Inc.*, 395 F.3d 888, 892 (8th Cir. 2005). The Court must also assume that all conflicts in the evidence were resolved in favor of the prevailing party, and the Court must assume as proved all facts that the prevailing party's evidence tended to prove. *E.E.O.C. v. Kohler Co.*, 335 F.3d 766, 772 (8th Cir. 2003). The motion should be denied unless the Court concludes that no reasonable juror could have returned a verdict for the nonmoving party. *Billingsley v. City of Omaha*, 277 F.3d 990, 995 (8th Cir. 2002).

(b) Rule 59

A motion for new trial is governed by [Federal Rule of Civil Procedure 59](#). The standard for granting a new trial is whether the verdict is against the great weight of the evidence. *Butler v. French*, 83 F.3d 942, 944 (8th Cir. 1996). In evaluating a motion for a new trial pursuant to Rule 59(a), the key question is whether a new trial should have been granted to avoid a miscarriage of justice. *McKnight By & Through Ludwig v. Johnson Controls, Inc.*, 36 F.3d 1396, 1400 (8th Cir. 1994).

Rule 59(e) permits a court to alter or amend a judgment, but it may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n.5 (2008). A district court has broad discretion in determining whether to grant or deny a motion to alter or amend judgment. *United States v. Metro. St. Louis Sewer Dist.*, 440 F.3d 930, 934 (8th Cir. 2006).

Rule 59(e) motions serve the limited function of correcting manifest errors of law or fact or to present newly discovered evidence. *Id.*

2. CAUSATION

Werner requests a new trial because the Court allegedly erred when it granted the EEOC's motion for a partial directed verdict on the issue of causation, [filing 316](#). Based on the evidence presented at trial, the Court ruled that if a jury determined the EEOC had met its burden of showing that Robinson was a qualified individual, the EEOC had proved that Robinson's disability was the but-for cause of Werner's hiring decision as a matter of law. [Filing 316 at 4](#). The Court considered *all* of the evidence presented to the jury, including testimony by Werner's own employees and experts, and determined that there was insufficient evidence to create an issue of fact for the jury on the EEOC's causation element. *See* Rule 50; [Lane](#), 610 F.2d at 1388; [filing 345 at 21](#); [filing 344 at 170](#); [filing 345 at 48](#); [filing 345 at 76](#); [filing 345 at 79](#); [filing 346 at 4-5](#); [filing 346 at 136](#). Accordingly, the Court did not instruct the jury on the issue of causation.

The EEOC had the burden to prove that Robinson was qualified—that is, that Robinson could perform the essential functions of the job for which he applied with or without a reasonable accommodation. *See* 42 U.S.C. §§ 12112(a), [12111\(8\)](#); [Knutson v. Schwan's Home Serv., Inc.](#), 711 F.3d 911, 914 (8th Cir. 2013). The EEOC also had the burden to prove that Werner's failure to hire Robinson was on the basis of his disability. The EEOC proved the causation element of its claim, and Werner presented no evidence by which a reasonable juror could find otherwise. *See* [Ehrhardt](#), 21 F.3d at 269.

In its post-trial brief, Werner primarily relies on [Matthews v. Commonwealth Edison Co.](#), 128 F.3d 1194 (7th Cir. 1997). Werner purports that the Eighth Circuit adopted the reasoning of *Matthews* . . . albeit in a

footnote. [Filing 356 at 5](#) (citing *Mole v. Buckhorn Rubber Prods., Inc.*, 165 F.3d 1212, 1219 n.3 (8th Cir. 1999)). It's true that the ADA allows an employer to fire a disabled worker "because he is unable to do his job," even if the disability is the reason the worker cannot do the job. *Matthews*, 128 F.3d at 1197-98; see also *Harris v. Polk Cnty.*, 103 F.3d 696, 697 (8th Cir. 1996). But an employer *cannot* categorically deny employment to a group of individuals with a certain disability if any of those individuals are qualified to do the job.

The employer in *Matthews* implemented a reduction-in-force plan that scored employees based on work performance, and a disabled employee had too low of a score due to work he missed because of his disability. [128 F.3d at 1197](#). The *Matthews* court determined that the employer did not violate the ADA because it presented a facially neutral policy that adversely affected a disabled employee, and it was the *consequences* of the disability that caused the employee to be terminated. *Id.*

Contrary to Werner's assertions, that case doesn't fit the facts here. Werner decided Robinson was unable to do his job because he was deaf, not because of a collateral "consequence" of his deafness. Werner argues that it didn't hire Robinson because he couldn't "safely engage in contemporaneous communication with his trainer while driving, without diverting his eyes from the road." But that's just describing his deafness with more words, not identifying a "consequence" of it. See [filing 356 at 5](#). As the EEOC put it, an employer cannot "escape liability for refusing to hire a wheelchair bound applicant by claiming it was really the applicant's inability to climb stairs . . . that led to the decision." [Filing 283 at 9](#).

There's no facially neutral policy¹ at play here like in *Matthews*. There was not another qualified individual that Werner hired instead of Robinson. *Cf. Matthews*, 128 F.3d at 1196 (citing *Sirvidas v. Commonwealth Edison Co.*, 60 F.3d 375, 378 (7th Cir. 1995)). Robinson did not have performance issues prior to applying to Werner, or during his application process. *Cf. Mole*, 165 F.3d at 1219 n.3; *Mitchell v. United States Postal Serv.*, 738 Fed. App'x 838, 847 (6th Cir. 2018). Robinson didn't have missing paperwork when he submitted his application. *Cf.* case no. 8:18-cv-369 (the *Deuschle* case). Robinson didn't violate any company policies. *Cf. McNary v. Schreiber Foods, Inc.*, 535 F.3d 765, 769 (8th Cir. 2008).

Rather, Robinson was deaf, so Werner didn't hire him. [Filing 345 at 21-22](#). The evidence indicated that Werner would treat every other deaf driver in Robinson's position *exactly* the same way. Werner argues that it proffered a "legitimate, nondiscriminatory reason" for not hiring Robinson, but those arguments are misplaced: the *McDonnell-Douglas* burden-shifting paradigm was not applicable in this case. *See Baker v. Union Pac. R.R. Co.*, 580 F. Supp. 3d 647, 659 (D. Neb. 2022); *Belk v. S.W. Bell Tel. Co.*, 194 F.3d 946, 951-52 (8th Cir. 1999). There was direct evidence of discrimination—Werner *told* Robinson it didn't hire him because he's deaf. And Werner admitted it would *never* hire a deaf driver with less than six months' experience. An employer need not have malice or animus to have violated the ADA. *See Cushman v. Union Pac. R.R. Co.*, No. 8:23-cv-196, 2024 WL 1094703, at *7 (D. Neb. Mar. 12, 2024) (citing

¹ Werner claimed, as an unwritten company policy, drivers with less than six months' experience were required to engage in simultaneous two-way communication during the trainer-observed on-the-road component of its placement driver program. This isn't a neutral policy because, on its face, it can only be accomplished by hearing drivers.

Bostock v. Clayton Cnty, Georgia, 590 U.S. 644, 663 (2020); *Murray v. UBS Sec., LLC*, 144 S. Ct. 445, 453 (2024)).

According to *Matthews*, even if an individual is qualified, "if his employer fires him for any reason other than that he is disabled there is no discrimination 'because of' the disability." *Id.* at 1196. But the cases relied on by the *Matthews* court are actually premised on whether an individual is qualified, *not* whether the individual's disability caused the adverse employment action. *Siefken v. Village of Arlington Heights*, 65 F.3d 664, 667 (7th Cir. 1995); *Daughterty v. City of El Paso*, 56 F.3d 695, 698 (5th Cir. 1995); accord *Lipp v. Cargill Meat Sol. Corp.*, 911 F.3d 537, 544 (8th Cir. 2018) ("Ultimately, we conclude she was not a qualified individual. Lipp has not demonstrated that at the time of her termination she could regularly and reliably attend work, an essential function of her employment."); *Grant v. Cnty of Erie*, No. 12-cv-65, 2017 WL 2180796, at *7 (W.D.N.Y. May 18, 2017).

There was no evidence from which a jury could find that Werner would ever hire a deaf driver with less than six months' experience. As the Court previously ruled, the issues in this case have always been whether Robinson was qualified to perform the job for which he applied, and whether any reasonable accommodation would have enabled him to do so. And Werner did not present any evidence to warrant submitting the question of causation to the jury.² Werner's motion for a new trial on this basis is denied.

² The EEOC moved *in limine* to prevent Werner from presenting any other reason that it did not hire Robinson. The Court overruled that motion without prejudice to reassertion. See [filing 303 at 6](#). The EEOC never had to reassert their objection because Werner never proffered any evidence or argument that it failed to hire Robinson for any reason other than his deafness. Werner claims the Court "inexplicably departed" from the reasoning in its order on the parties' motions *in limine*. [Filing 356 at 6](#) (quoting [filing 303](#)). But the departure is

3. AFFIRMATIVE DEFENSES—UNDUE HARDSHIP AND DIRECT THREAT

At the summary judgment stage, the Court dismissed Werner's undue burden and direct threat affirmative defenses. *See* [filing 265 at 11-12, 14-15](#). Werner argues it is entitled to a new trial based on these alleged errors. The Court will reject Werner's motion for a new trial on these grounds for the same reasons it dismissed the affirmative defenses on summary judgment.

(a) Undue Hardship

On summary judgment, Werner provided the conclusory assertion that the EEOC's proposed accommodations would have "fundamentally alter[ed] the nature of the business operation" by "prevent[ing] a trainer from providing instantaneous safety training." *See* [filing 252 at 34](#). But Werner presented no evidence by which a trier of fact could make such a determination. At summary judgment, Werner's evidence neither provided what the fundamental nature of its business was, nor how "contemporaneous minute-by-minute training for inexperienced drivers" was a part of it. *See* [filing 252 at 34-35](#). The Court appropriately dismissed this affirmative defense because Werner failed to carry its burden on summary judgment. [Filing 265 at 15](#) (citing *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 686-91 (2001)).

(b) Direct Threat

The Court dismissed Werner's "direct threat" affirmative defense because Werner failed to perform a "particularized enquiry" into the risks posed or faced by the employee. [Filing 265 at 12](#) (quoting *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 86 (2002)). Werner claims that its safety director,

explicable: the Court carefully listened to the evidence adduced at trial, and determined that the EEOC had met its burden for its Rule 50 motion. *See* [filing 316](#).

Jamie Hamm, researched the relevant objective medical and safety data prior to making a determination about whether to hire Robinson, and this created a contestable issue on Werner's direct threat defense.

Werner was able to present all the same evidence and argue for a verdict in its favor based on the elements of the EEOC's prima facie case.³ See [filing 303 at 7](#). So, the only harm Werner could have suffered was that it didn't get a jury instruction on direct threat. . . and it didn't ask for one. See [filing 295](#) (Werner's proposed jury instructions); [filing 347 at 903-918](#) (formal jury instruction conference). The Court didn't err in failing to give an instruction that no one asked for. See [Fed. R. Civ. P. 51\(d\)\(1\)\(B\)](#); [Weber v. Strippit, Inc.](#), 186 F.3d 907, 915 (8th Cir. 1999). A new trial is not warranted.

4. EVIDENTIARY RULINGS

Werner additionally moves for a new trial based on certain evidentiary rulings, outlined in the Court's order on the parties' motions in limine ([filing 303](#)). Specifically, Werner argues the Court should have excluded certain emails and chat messages where employees made discriminatory remarks

³ A person is not qualified under the ADA if he presents a "direct threat" to the health or safety of others that cannot be eliminated by a reasonable accommodation. [42 U.S.C. §§ 12113\(b\), 12111\(3\)](#). Werner was able to present evidence and argument that Robinson presented a safety risk, and he was therefore unqualified. Under the "direct threat" affirmative defense, the burden would be on Werner to show that Robinson was *not* qualified, rather than the burden being on the plaintiff to show that Robinson *was* qualified. See [Baker](#), 580 F. Supp. 3d at 659 n.2 (citing [EEOC v. Wal-Mart Stores, Inc.](#), 477 F.3d 561, 571 (8th Cir. 2007)). But here, the jury found that the EEOC met its burden, despite Werner's evidence. *Even if* the Court erred in dismissing Werner's affirmative defense, such error was harmless because Werner was still able to present evidence regarding its argument that Robinson posed an unreasonable safety risk—evidence the jury necessarily rejected.

about deaf applicants. Werner also argues the Court should have permitted evidence of Robinson's driving record at trucking companies after he was not hired by Werner.

(a) Erin Marsh

The Court admitted emails between Erin Marsh and the recruiter in charge of Robinson's application, where Marsh and the recruiter mocked and complained about deaf applicants for the over-the-road trucking position. Werner contends that Marsh lacked a significant connection to the alleged adverse employment action, and so any statements by her were "stray remarks" that did not bare on any alleged discrimination. Werner also contends that the statements admitted were made years after Werner did not hire Robinson. Werner objected to the admission of the emails based on [Fed. R. Evid. 403](#), and on foundation.

The EEOC laid sufficient foundation to admit the emails. The evidence demonstrated that, at the time Robinson was not hired, Marsh was a manager of student and driver recruiting; Marsh spoke directly with Jamie Hamm, who ultimately decided not to hire Robinson; Marsh spoke with Robinson about his application personally; and Marsh participated in the phone call with Robinson and Hamm when Robinson was told he would not be hired because Werner would not accommodate his deafness. See [filing 345 at 83](#). The Court determined the timing of the emails was not so far removed from the relevant period, especially considering that Marsh held the same position when she sent the emails as when Robinson was not hired. See [Fitzgerald v. Action, Inc.](#), 521 F.3d 867, 876-77 (8th Cir. 2008). The EEOC presented evidence that Marsh was part of the decision-making process for Robinson's application, and Marsh's comments demonstrated a discriminatory animus in the decisional process. See [Arraleh v. Cnty of Ramsey](#), 461 F.3d 967, 975 (8th Cir. 2006).

The Court determined that the emails were sufficiently relevant to Werner's decision not to hire Robinson, based on the emails' context, content, and timing. *Fitzgerald*, 521 F.3d at 877. Further, Marsh was given the opportunity to explain her comments to the jury, and explain her attitude and Werner's attitude towards deaf people. The Court did not err in admitting these statements.

(b) Robinson's Subsequent Job Performance

The Court excluded evidence under [Fed. R. Evid. 403](#) of Robinson's job performance after he was not hired by Werner. The accidents had little relevance to the safety of a deaf driver communicating with another person in the cab of a truck while training, which was the issue presented to the jury. See [filing 322 at 6](#). This evidence presented risks of confusing the issues, inflaming prejudice against deaf truck drivers generally, and needlessly extending the trial to include "mini-trials" about the facts and circumstances of each accident in which Robinson was involved, so the Court did not allow the jury to hear evidence of those accidents. The jury did hear evidence of Robinson's experience *training* at other trucking companies. *E.g.*, [filing 344 at 128](#). No new trial is warranted.⁴

5. QUALIFIED INDIVIDUAL

Werner also argues that no reasonable juror could find that Robinson was qualified for the position for which he applied because Robinson did not meet the hearing standard in [49 C.F.R. § 391.41\(b\)\(11\)](#). [Filing 356 at 20](#).

⁴ Robinson's later job performance at other companies was relevant to the Court's consideration of backpay. The Court properly considered this mitigating evidence in determining that Robinson was not entitled to backpay beyond 2018. See [filing 353](#).

Werner argues it did not have to accept Robinson's exemption to the FMCSA hearing requirement. The Court rejected that argument on summary judgment. [Filing 265 at 6-7](#).

Under the federal regulations, a person is physically qualified to drive a commercial motor vehicle if that person meets physical qualification standards in § 391.41(b), *or if* that person "obtained from FMCSA a medical variance from the physical qualification standards in paragraph (b)." § 391.41(a)(3)(i)-(ii). Robinson obtained an FMCSA medical variance from § 391.41(b)(11), *see* [80 Fed. Reg. 18924-01 \(Apr. 8, 2015\)](#), so he was qualified under the federal regulations. Werner's reliance on *Albertson's, Inc. v. Kirkingburg*, [527 U.S. 555 \(1999\)](#), *see* [filing 356 at 21-22](#), is misplaced for the reasons explained in the summary judgment order. [Filing 265 at 6-7](#).

Werner additionally argues that the EEOC did not present evidence that Robinson was qualified for the over-the-road driving position at Werner. At the time Robinson was hired, Werner required that applicants have at least six months experience, otherwise applicants would be put in the "placement driver program." Werner characterized the "placement driver" position as separate and distinct from the "over-the-road driver" position, though Robinson's job application indicated he was applying as an "over-the-road truck driver." *See* trial ex. 2.

While the Court distinguished the "placement driver" and "over-the-road driver" positions in its summary judgment order, there's no evidence that Robinson applied to the "placement driver" position. There was no reason to instruct the jury that Robinson applied for a "placement driver" position when all the evidence indicated he applied for an over-the-road truck driving position, regardless of the position for which *Werner* considered him. In any event, the EEOC presented sufficient evidence by which a jury could determine

whether the trainer-observed over-the-road component of the placement driver program was an essential function of the over-the-road truck driver position, and whether Robinson could complete that function with or without a reasonable accommodation.

According to Werner, simultaneous communication during the trainer-observed component of the placement driver program was essential, and Werner argues its determination is dispositive. The jury was instructed on how to determine whether a purported job duty was an essential function. *See* [filing 322 at 14](#). *One factor* to consider is the employer's judgment as to which functions of the job are essential. *Knutson*, 711 F.3d at 914. But other factors, such the written job descriptions provided to prospective employees, the amount of time on the job spent performing the function, the consequences of not requiring the function, and the current work experience of those in similar jobs, are also properly considered, and are to be weighed by a jury. *Id.*

The EEOC presented evidence that the "simultaneous communication" element was not essential, and Robinson could have been safely accommodated to be able to perform the trainer-observed component of Werner's training program. *EEOC v. Convergys Cust. Mgmt. Grp., Inc.*, 491 F.3d 790, 796 (8th Cir. 2007). Specifically, the EEOC presented evidence from other trucking companies about possible accommodations, as well as expert testimony. Sufficient evidence supports the jury's verdict.

6. PUNITIVE DAMAGES

Werner argues that the Court erroneously submitted the issue of punitive damages to the jury, warranting a new trial. [Filing 356 at 15](#). Werner alternatively argues that the jury did not have a legally sufficient basis to award punitive damages, and Werner is entitled to judgment as a matter of law on the EEOC's claim. [Filing 356 at 24](#).

An employer may be held vicariously liable in the punitive damages context for the discriminatory employment decisions of "managerial agents" acting within the scope of their employment. *Bennett v. Riceland Foods, Inc.*, 721 F.3d 546, 553 (8th Cir. 2013); *Heaton v. The Weitz Co.*, 534 F.3d 882, 889 (8th Cir. 2008); *E.E.O.C. v. Siouxland Oral Maxillofacial Surgery Assocs., L.L.P.*, 578 F.3d 921, 925 (8th Cir. 2009) (citing *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526 (1999)). A jury instruction on punitive damages is warranted if a plaintiff presents evidence that an employer acted with malice or reckless indifference to an employee's right not to be discriminated against on the basis of his disability. See 42 U.S.C. § 1981a(b)(1).

Marsh's emails provided *some* evidentiary support for punitive damages, but those emails were neither dispositive nor the primary evidence of maliciousness or reckless indifference. Other support came from the cross-examination of Jamie Hamm, Werner's vice president of safety. Hamm testified that she had one conversation with Robinson for about half an hour. Hamm testified that she was familiar with federal antidiscrimination laws, and she testified that Werner accommodated other employees. [Filing 346 at 133-34](#). She stated she conducted an investigation about ways to possibly accommodate Robinson in the placement driver program, but she could not come up with any to her satisfaction. [Filing 346 at 139](#). Notably, Hamm did not communicate with any of Werner's trainers to identify anyone who might know American Sign Language, or any concerns (or lack thereof) the trainers might have about training deaf drivers. [Filing 346 at 187](#).

The EEOC presented rebuttal testimony from Lance Knapp, an employee of the Nebraska Equal Opportunity Commission, who called into question Hamm's characterization of her "investigation." According to Knapp, Hamm said that she had not done *any* research about possible

accommodations. [Filing 346 at 201](#). Knapp also testified that Hamm did not say she reached out to the FMCSA, the EEOC, or the Nebraska Department of Transportation, contrary to Hamm's own testimony. *Id.* It's distinctly possible that a jury did not find Hamm's characterization of her hiring decision to be credible.

Also supporting punitive damages was Robinson's own testimony. He testified that he was told Werner could not hire him due to his deafness after having him as a student in its CDL school. Werner encouraged him to apply, pre-approved his application, and conducted a 30-minute phone conversation—only to tell him that Werner thought he could not safely complete its training program. Robinson's testimony about his experience, Marsh's discriminatory remarks, and Hamm's testimony all support the submission of punitive damages to the jury. Werner's motion is denied.

7. INJUNCTIVE RELIEF

Werner also requests that this Court eliminate or amend its injunctive relief. The judgment requires Werner to submit biannual reports to the EEOC regarding any "hearing-impaired applicant for an over-the-road truck driving position." [Filing 354](#). Werner asks to vacate the injunctive relief altogether. That request will be denied. Injunctive relief was awarded for the reasons detailed in the Court's findings of facts and conclusions of law, [filing 353](#), and those reasons will not be revisited here.

Werner requests that the injunctive relief be narrowed because "hearing-impaired applicant" is too broad and might extend to non-disabled individuals. [Filing 356 at 26](#). The Court agrees, and will amend the injunctive relief to only apply to individuals with an FMCSA hearing exemption, which was the type of discrimination proved in this case. See *Easley v. Anheuser-Busch, Inc.*, 758 F.2d 251, 263 (8th Cir. 1985).

III. WERNER'S OBJECTIONS TO BILL OF COSTS

Werner also objects to some of the costs taxed. [Filing 372](#). District courts have substantial discretion in awarding costs. *Marmo v. Tyson Fresh Meats, Inc.*, 457 F.3d 748, 762 (8th Cir. 2006) (citing *Computrol, Inc. v. Newtrend, L.P.*, 203 F.3d 1064, 1072 (8th Cir. 2000)); *see also* Fed. R. Civ. P. 54(d). However, courts may only award the types of costs enumerated in 28 U.S.C. § 1920. *E.g.*, *Brisco-Wade v. Carnahan*, 297 F.3d 781, 782 (8th Cir. 2002). The prevailing party bears an initial burden to verify that costs were "necessarily incurred," and the "services for which fees have been charged were actually and necessarily performed." § 1924; *see also, e.g.*, Bill of Costs Handbook for the U.S. District Court for the District of Nebraska § IV(C)(2). And the prevailing party is presumptively entitled to recover verified costs; the losing party bears the burden of overcoming that presumption. *Thompson v. Kanabec Cnty.*, 958 F.3d 698, 709 (8th Cir. 2020) (citing *Janis v. Biesheuvel*, 428 F.3d 795, 801 (8th Cir. 2005)); *168th and Dodge, LP v. Rave Reviews Cinemas, LLC*, 501 F.3d 945, 958 (8th Cir. 2007).

1. DEPOSITIONS IN *DEUSCHLE* CASE

Werner primarily argues that several of the costs for depositions should be reduced by half because certain individuals were only deposed once, but were witnesses in both this and the companion *Deuschle* case. The EEOC was not successful in the *Deuschle* case and, Werner argues, it should not be able to recover costs incurred for that case. The Clerk of the Court taxed Werner in the amount of \$37,898.88. [Filing 369](#). By contrast, in the companion *Deuschle* case, the Clerk taxed the EEOC in the amount of \$12,275.13. *See* [filing no. 373](#) in case no. 18-cv-329. The difference is primarily because Werner only requested half of the costs of each deposition. *See id.*

The EEOC argues that Werner has cited no authority warranting reducing the costs because the depositions were used in two cases. See [filing 374](#). According to the EEOC, it would have incurred those costs regardless of the *Deuschle* case, and should be able to recover the full amount here. But Werner presented a logical reason for reducing the EEOC's requested award. In the interests of fairness, and to promote efficiency in discovery through consolidated cases, the Court, in its discretion, will reduce by half the costs of depositions that were used in both this and the *Deuschle* cases.

Werner also argues that some costs should be eliminated because they were not "necessarily incurred" for this case. [Filing 373 at 5](#). Specifically, Werner argues some witnesses were only relevant to the *Deuschle* case, and were not called to testify in this case. The Court is not persuaded. The EEOC has verified that costs were necessarily incurred; that the EEOC made certain strategic decisions to call certain witnesses does not make those depositions unnecessary. Werner has not overcome the presumption that the EEOC is entitled to recover those costs.

2. VIDEO AND STENOGRAPHIC DEPOSITION COSTS

Werner argues that the EEOC should not be able to recover costs for video transcripts of video depositions not shown at trial. Werner recovered costs for both printed transcripts and video recordings in the *Deuschle* case, but argues the EEOC should not be afforded the same costs in this case. [Filing 373 at 7 n.2](#).

Costs for both a video recorded deposition and a printed transcript are recoverable if the prevailing party explained how the deposition was useful in resolving contested issues, if the losing party did not object to the video recording of the depositions, and if the prevailing party demonstrated why both expenditures were reasonably necessary at the time the costs were expended.

Handbook § IV(C)(3)(e); *see also Stanley v. Cottrell, Inc.*, 784 F.3d 454, 465 (8th Cir. 2015) (quoting *Smith v. Tenet Healthsystem SL, Inc.*, 436 F.3d 879, 889 (8th Cir. 2006)); *JBS USA*, 2015 WL 2212644, at *2 ("where the prevailing party demonstrates both paper and electronic copies were reasonably necessary, the court may tax costs for both"); *Alt. Med and Pharmacy, Inc. v. Express Scripts, Inc.*, No. 4:14-cv-1469, 2016 WL 3443574, at *2 (E.D. Mo. June 23, 2016); *Jo Ann Howard & Assoc., P.C. v. Cassity*, 146 F. Supp. 3d 1071, 1077-78 (E.D. Mo. 2015) (citing *Zotos v. Lindbergh Sch. Dist.*, 121 F.3d 356, 363 (8th Cir. 1997)).

The EEOC explained how the depositions were useful. And Werner did not object to the EEOC's notice that it would video-record the depositions. The EEOC also sufficiently verified why video was important. *See filing 374 at 9.* Because the case involved a deaf claimant, it was reasonably necessary to have transcripts synced to the videos so that Robinson could assist the EEOC in developing the case. The Court has considered the complexity of this case, the importance of the witnesses, and the Court's standard procedure for video depositions. The EEOC's costs for both video and stenographic deposition transcripts were reasonably necessary. Werner will be taxed these costs.

3. EXPERT COSTS

Finally, Werner argues it should not be taxed \$581.94 for costs related to Don Olds' stay in Omaha while Werner presented its defense. *Filing 373 at 8.* Werner asserts that Olds already knew what Werner's experts would testify to, because they already did in the *Deuschle* case, and the EEOC knew or should have known it would not call Olds as a rebuttal witness. But, as has been discussed, this case and the *Deuschle* case were different and presented different issues. The EEOC reasonably wanted Olds in the courtroom during Werner's defense, if any of Werner's experts testified differently than in the

Deuschle case. There's no guarantee that nothing would have changed in Werner's experts' testimony. Werner has not persuaded the Court that the EEOC is not entitled to these costs.

4. COST AWARD

To summarize, the following costs will be awarded:

Description of Costs	Costs Requested	Costs Awarded
Erin Marsh Deposition	\$3,527.72	\$1,763.86
Ben Pile Depositions	\$5,768.35	\$2,884.18
Richard Johnson Deposition	\$2,141.20	\$1,070.60
William C. Adams Deposition and Expert Fee	\$3,429.70	\$1,714.85
Jaime Hamm Deposition	\$4,458.25	\$2,229.13
Christopher Hilkemann, Clarence Easterday, Jr., Lathen Whited, Wayne Cederholm, and Lindsey Wilbert Depositions	\$3,390.40	\$1,695.20
Morgan Baker-Maloy Deposition	\$1,532.25	\$766.13
Andrew Deuschle and Victor Robinson Deposition	\$898.45	\$449.23
First 30(b)(6) Deposition (Scott Hollenbeck, Theresa Tibbels, and Steve Tisinger) ⁵	\$6,468.48	\$3,234.24
Second 30(b)(6) Deposition (Brett Ramsey and Scott Hollenbeck)	\$1,553.80	\$776.90
Scott Hollenbeck Deposition	\$795.00	\$397.50
Printing Fees	\$508.82	\$508.82
Transcript Fees	\$5,137.10	\$5,137.10
Don Olds' Travel	\$2,300.50	\$2,300.50
TOTAL	\$41,910.02	\$24,928.24

⁵ The Clerk's award already reduced these costs, and the costs of the second 30(b)(6) deposition, by half.

See [filing 359-1](#). Werner will be taxed costs in the amount of \$24,928.24.

IV. PREJUDGMENT INTEREST

In accordance with the Court's findings of fact and conclusions of law ([filing 353](#)), the EEOC has moved to amend the judgment to include prejudgment interest on the backpay award. [Filing 358](#). The parties have stipulated that \$11,060.67 is an appropriate calculation, using the IRS interest rate compounded annually. *Id.* at 2; [filing 358-1 at 1](#). According to the EEOC, the "IRS rate closely tracks the federal prime rate," which other courts have approved as appropriate rates to calculate prejudgment interest. [Filing 358 at 2](#) (citing *Sanders v. Union Pac. R.R. Co.*, No. 4:20-cv-3023, 2022 WL 3446132 at *2 (D. Neb. Aug. 17, 2022); *Arroyo v. Volvo Group N.A., LLC*, No. 12-cv-6859, 2017 WL 2985649 at *10 (N.D. Ill. July 13, 2017)).

In its discretion, the Court will amend the judgment to award \$11,060.67 in backpay. See *Cont'l Indem. Co. v. IPFS of N.Y., LLC*, 7 F.4th 713, 717 (8th Cir. 2021); *Turn Key Gaming, Inc. v. Oglala Sioux Tribe*, 313 F.3d 1087, 1093 (8th Cir. 2002) (quoting *Cargill, Inc. v. Taylor Towing Serv., Inc.*, 642 F.2d 239 (8th Cir. 1981)).

V. CONCLUSION

During the course of this six-year litigation, Werner made inconsistent arguments. It claimed it didn't discriminate against deaf people, but even if it did, that's allowed because actually, inexperienced deaf drivers can't possibly be qualified for an over-the-road trucking job at Werner. Werner presented evidence that it did not, and would not ever, hire *any* deaf driver who had to engage in its placement driver program. At the same time, Werner argued it didn't outright reject any inexperienced deaf applicants . . . contrary to the evidence Werner actually provided. This doublespeak has been difficult for the

Court to sort throughout the entire case—from the pleading stage to discovery to trial.

Ultimately, the evidence provided by both the EEOC and Werner indicated that Werner categorically excluded deaf drivers who needed training. That categorical exclusion was properly posed to the jury, and the jury could have found that Werner's hiring decision was justifiable as a business necessity, *see* [filing 322 at 12](#), supportable as Werner exercising its business judgment, *see* [filing 322 at 16](#), or a valid assessment that Robinson in particular, or deaf drivers generally, were not qualified for the job. But, a fully-informed jury believed the EEOC's characterization of deaf drivers, reasonable accommodations, and Werner's training program.

As much as Werner tried to prove that it was manifestly, unreasonably unsafe for deaf drivers to *ever* take their eyes off the road, a jury believed that Robinson could have been accommodated to safely perform the essential functions of the job for which he applied, and Werner failed to make the reasonable accommodations that others in the trucking industry had. A jury found that Robinson was qualified. The type of discrimination alleged in this case is the type of discriminatory hiring decision the ADA is intended to eliminate. *See* [42 U.S.C. § 12101\(a\)\(5\)](#). For these reasons, Werner's post-trial motions will be denied.⁶

Accordingly,

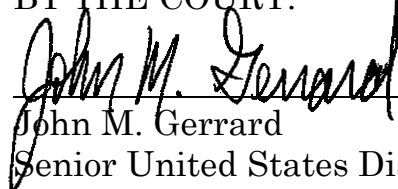
IT IS ORDERED:

⁶ Because Werner's request for a new trial is denied, the Court need not address Werner's arguments about instructing the jury on the EEOC's failure-to-accommodate claim. *See* [filing 356 at 18](#).

1. Werner's motion for judgment as a matter of law or, in the alternative, motion for a new trial or to *alter or amend the judgment* (filing 355) is granted in part and denied in part.
2. Werner's motion to review taxation of costs (filing 372) is granted in part and denied in part.
3. Costs in the amount of \$24,928.24 are taxed in favor of the EEOC and against Werner and will be added to the judgment.
4. The EEOC's motion to amend the judgment (filing 358) is granted.
5. An amended judgment will be entered.

Dated this 23rd day of May, 2024.

BY THE COURT:



John M. Gerrard
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff,

vs.

DRIVERS MANAGEMENT, LLC,
and WERNER ENTERPRISES, INC.

Defendants.

8:18-CV-462

AMENDED JUDGMENT

Pursuant to the jury's verdict ([filing 323](#)), the Court's findings of fact and conclusions of law ([filing 353](#)), and the accompanying memorandum and order, judgment is entered for the plaintiff and against the defendants in the amount of \$335,682.25, plus prejudgment interest in the amount of \$11,060.67, plus costs pursuant to [Fed. R. Civ. P. 54\(d\)](#) in the amount of \$24,928.24.

For a period of three years from the date of this judgment, defendant Werner Enterprises shall report in writing to the plaintiff, no less frequently than every six months:

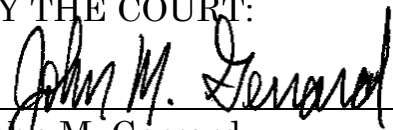
- the name and available contact information for any applicant for an over-the-road truck driving position who possesses an exemption from the Federal Motor Carrier Safety Administration's physical qualifications standard concerning hearing for interstate drivers,
- the date of that application,
- whether or not the applicant was hired,

- the dates on which the employment decision was made and communicated to the applicant,
- the basis for declining to hire any of the above-described applicants, and
- whether any applicant hired remains employed with Werner six months after being hired, and if not, the reason for the separation.

The defendants shall file proof of such reports with the Court.

Dated this 23rd day of May, 2024.

BY THE COURT:



John M. Gerrard
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

EQUAL EMPLOYMENT OPPORTUNITY)	CASE NO. 8:18-cv-462
COMMISSION,)	
)	
Plaintiff,)	
)	DEFENDANTS'
vs.)	NOTICE OF APPEAL
)	
DRIVERS MANAGEMENT, LLC, and)	
WERNER ENTERPRISES, INC.,)	
)	
Defendants.)	

COME NOW Defendants Drivers Management LLC and Werner Enterprises, Inc. (collectively, "Werner") and hereby give notice of their intent to appeal from the final judgment in the above-captioned matter and from all orders entered in favor of Plaintiff Equal Employment Opportunity Commission, including the following:

- March 31, 2023 Memorandum and Order (Filing 265);
- March 31, 2023 Order (Filing 266);
- August 23, 2023 Order on Motions in Limine (Filing 303);
- August 27, 2023 Order on Deposition Designations (Filing 305);
- August 31, 2023 Order Granting Plaintiff's Motion for Partial Directed Verdict (Filing 316);
- The Court's oral rulings regarding objections to certain questions and exhibits offered during the trial examination of Erin Marsh;
- The Court's oral rulings regarding objections to certain questions asked and exhibits offered during the trial examinations of Victor Robinson;
- The Court's oral rulings regarding objections to certain questions asked and exhibits offered during the trial examination of Jaime Hamm;
- The Court's oral rulings regarding objections to certain questions asked and exhibits offered during the trial examination of Ben Pile;
- The Court's oral rulings on August 30, 2023, granting Plaintiffs leave to submit the issue of punitive damages to the jury and to introduce evidence of Werner's net worth;

- Final Jury Instructions (Filing 322) and Verdict Form and the Court's oral ruling overruling Werner's objections to Final Jury Instructions and Verdict Form (made on the record during the final jury instruction conference);
- Order denying Werner's Rule 50(a) Motion for Judgment as a Matter of Law and Werner's renewed Motion for Judgment as a Matter of Law (made on the record at the conclusion of Plaintiffs' case and again before the case was submitted to the jury);
- October 2, 2023 Order on Motions in Limine (Filing 330);
- January 10, 2023 Findings of Fact and Conclusions of Law (Filing 353);
- Judgment dated January 10, 2024 (Filing 354);
- May 23, 2024 Order denying in part Werner's Motion for Judgment as a Matter of Law or, in the Alternative, Motion for a New Trial or to Alter or Amend (Filing 376);
- Amended Judgment dated May 23, 2024.

WERNER ENTERPRISES, INC. and
DRIVERS MANAGEMENT, LLC,
Defendants

By: /s/ Elizabeth A. Culhane
Elizabeth A. Culhane, #23632
Patrick J. Barrett, #17246
FRASER STRYKER PC LLO
500 Energy Plaza
409 South 17th Street
Omaha, NE 68102
Telephone: (402) 341-6000
Facsimile: (402) 341-8290
eculhane@fraserstryker.com
pbarrett@fraserstryker.com
ATTORNEYS FOR DEFENDANTS
WERNER ENTERPRISES, INC. and
DRIVERS MANAGEMENT, LLC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was electronically filed with the Clerk of the Court for the United States District Court for the District Court of Nebraska using the CM/ECF system on this 21st day of June, 2024, which system sent notification of such filing to all parties' counsel of record.

/s/ Elizabeth A. Culhane

3232388v1

U. S. COURT OF APPEALS - EIGHTH CIRCUIT
NOTICE OF APPEAL (NOA) SUPPLEMENT
DISTRICT OF NEBRASKA

Please note any additions or deletions to the style of the case from the style listed on the docket sheet (or attach an amended docket sheet with the final style of case)

Caption:

Case Number:

Equal Employment Opportunity Commission 8:18cv462-JMG
v. Drivers Management, LLC et al

Appellant:

**Werner Enterprises, Inc. and Drivers
Management, LLC**

Attorneys:

Elizabeth A. Culhane
Patrick J. Barrett
Sarah L. McGill

Fraser, Stryker Law firm
409 South 17th Street
Suite 500, Energy Plaza
Omaha, NE 68102
(402) 341-6000

Appellee:

**Equal Employment Opportunity
Commission**

Attorneys:

Connie W. Gatlin
Equal Employment Opportunity Commission
Leland Federal Building
1919 Smith Street
6th Floor
Houston, TX 77002
(346) 327-7710

Joshua Pierson
Lauren M. Wilson
Equal Employment Opportunity Commission-Kansas
400 State Avenue
Suite 905
Kansas City, KS 66101
(913) 359-1807

Meredith S. Berwick
 Equal Employment Opportunity
 Commission-Missouri
 1222 Spruce Street
 Room 8.100
 St. Louis, MO 63103
 (314) 539-7915

Court Reporter(s):

Lisa Grimminger (402) 437-1908

Please return files and documents to:

Omaha

Person to contact about the appeal:

Mary Roundtree

Length of Trial	Fee	IFP	Pending IFP
6 Days	Y	N	N

Counsel	Pending Motions	Local Interest	Simultaneous Release?
Retained	N	N	N

Criminal Cases/Prisoner Pro Se Cases only:

Is defendant incarcerated? N/A

Where?

Please list all other defendants in this case if there were multiple defendants

Special Comments:

Forms-Appeal-NOA_Supplement
 Approved Date: 12/22/14